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ABSTRACT

Due to various factors, legal and jurisdictional issues often hinder the administration and delivery of Social and Rehabilitation Service (SRS) services on reservations. Focusing on child welfare programs, legal and jurisdictional problems concerning the delivery of SRS services on reservations and the means of coping with them were explored through field research at 10 reservations in 8 states and library legal research. Child welfare services were defined as including foster care, adoption, day care, protective services, and certain institutional and homemaker services. Field research disclosed complex interagency relationships and patterns of service delivery. Three major recurrent legal and jurisdictional problems were uncovered; conflicting legal interpretations about the roles and responsibilities of state or county offices in providing certain SRS services on reservations; state rulings that the state cannot license facilities on reservations; and reluctance of some state courts and institutions to honor tribal court orders. In the long run, no final resolution of the basic jurisdictional tension will be possible without major Federal legislation, probably including amendments to the Social Security Act. Several alternatives and recent legal rulings are discussed in detail. (NQ)

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# LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF SRS CHILD WELFARE SERVICES ON INDIAN RESERVATIONS

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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**Legal and Jurisdictional Problems in the Delivery of SRS Child Welfare Services on Indian Reservations**

**HIGHLIGHTS**

Social and Rehabilitation Service (SRS) programs are federal-state programs; authority for administering the delivery of SRS services clearly lies with states and their local political instrumentalities, counties. However, on many reservations the authority of state governments and the jurisdiction of state law are strictly limited or nonexistent. The Constitution, numerous court decisions, and federal law clearly reserve to Indian tribes important powers of self-government, including the authority to make and enforce laws, to adjudicate civil and criminal disputes including domestic relations cases, to tax, and to license.

SRS legislation generally requires its programs to be administered on a statewide basis. Some states, however, have taken the position that because of their limited jurisdiction on reservations, it is not possible to operate certain SRS programs on reservations in exactly the same fashion as elsewhere in the state.

There is a long history of struggle between tribal governments and state governments over a broad range of issues, including legal jurisdiction, water and mineral rights, and powers of taxation. This tension between tribes and state governments spills over into matters concerning the administration of SRS-funded programs on reservations.

An additional complicating factor is that the social service and financial assistance programs of the Bureau of Indian Affairs (BIA) are similar to some SRS programs. Although BIA and SRS policy both recognize that BIA programs are intended to supplement rather than to replace SRS programs, the application of this principle at the state and local level is not always easy.

Because of these factors, legal and jurisdictional issues often hinder the administration and delivery of SRS services on reservations. Field research on ten reservations in eight states disclosed complex interagency relationships and patterns of service delivery. Three major recurrent legal and jurisdictional problems were uncovered: (1) conflicting legal interpretations about the roles and responsibilities of state or county offices in providing certain SRS services on reservations; (2) state rulings that the state cannot license facilities on reservations; and (3) reluctance of some state courts and state institutions to honor tribal court orders.

In the long run, no final resolution of the basic jurisdictional tension will be possible without major federal legislation, probably including amendments to the Social Security Act. There was widespread support among interviewees for direct federal funding of child welfare programs through tribal governments. Others prefer mandatory or voluntary state contracts with tribes.

While basic structural reforms are being designed, various short-term improvements are feasible. Some short-term alternatives would be essential forerunners of any basic reform. The most important is continued development of tribally-run child welfare programs. Several other alternatives and recent legal rulings are discussed in detail.

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# CHAPTER 1

# INTRODUCTION

## Statement of the Problem

Social and Rehabilitation Service (SRS) programs are federal-state programs; authority for administering the delivery of SRS services clearly lies with states and their local political instrumentalities, counties. However, on many reservations the authority of state governments and the jurisdiction of state law is strictly limited or nonexistent. The Constitution, numerous court decisions, and federal law clearly reserve to Indian tribes important powers of self-government, including the authority to make and enforce laws, to adjudicate civil and criminal disputes including domestic relations cases, to tax, and to license.

SRS legislation generally requires its programs to be administered on a statewide basis. Some states, however, have taken the position that because of their limited jurisdiction on reservations, it is not possible to operate certain SRS programs on reservations in exactly the same fashion as elsewhere in the state.

In some states, the legal authority and jurisdiction of tribal governments has been limited by a federal law, Public Law 280, which permits certain states to extend their criminal and civil jurisdiction over reservations within their boundaries, subject to various preconditions. PL 280 is highly resented by many tribal governments. There is a long history of struggle between tribal governments and state governments over a broad range of issues, including legal jurisdiction, water and mineral rights, and powers of taxation. This tension between tribes and state governments spills over into matters concerning the administration of SRS-funded programs on reservations.

An additional complicating factor is that the social service and financial assistance programs of the Bureau of Indian Affairs (BIA) are similar to some SRS programs. Although BIA and SRS policy both recognize that BIA programs are residual--that is, they are intended to supplement rather than to replace SRS programs--the application of this principle at the state and local level is not always easy.

Because of these factors, sketched here in preliminary and highly simplified form, legal and jurisdictional issues often hinder the administration and delivery of SRS services on reservations. Field research on ten reservations in eight states disclosed complex interagency relationships and patterns of service

delivery. Three major recurrent legal and jurisdictional problems were uncovered: (1) conflicting legal interpretations about the roles and responsibilities of state or county offices in providing certain SRS services on reservations; (2) state rulings that the state cannot license facilities on reservations; and (3) reluctance of some state courts and state institutions to honor tribal court orders.

The result of these problems may be that services are not available, that facilities on reservations are not licensed and cannot receive SRS funds, that state and tribal courts issue conflicting orders, or that state institutions refuse to accept court commitments by tribal courts.

The purpose of this project was to define and analyze legal and jurisdictional problems concerning the delivery of SRS services on reservations and to explore means of coping with these problems.

## Project Methodology

The project focused on child welfare programs, because severe and intractable legal and jurisdictional problems have arisen with respect to these services and because there has been recent controversy about the substance and appropriateness of these services. For this study, child welfare services are defined as including foster care, adoption, day care, protective services, and certain institutional and homemaker services. These services are supported by SRS under Title IV-B and Title XX (previously IV-A) of the Social Security Act.

The research plan included field research at ten reservations as well as library legal research. The legal research consisted of gathering and analyzing a large number of available legal documents, including federal and selected state legislation, regulations, memoranda and correspondence, court decisions, attorneys' general opinions, tribal codes, and other materials. The field research helped to bring this legal material to life by providing information about the practical consequences of legal and jurisdictional issues and about how service providers were coping with these problems at the service delivery level.

The legal research was performed by the firm of Sherman and Morgan, P. C., and the field research was conducted by staff and consultants of the Center for Social Research and Development (CSRD). The two research teams closely coordinated the various components of the study.

This report summarizes the findings of both the legal and the field research. More detailed analysis is presented in a legal working paper* and a field research report.**

The legal and field research staff also conducted four training workshops on legal and jurisdictional problems in child welfare services on reservations. The workshops were supported by a Region VIII SRS Child Welfare Training grant and were held in April, May, and June, 1975, in four Region VIII states. They were attended by about 120 child welfare workers from private, state, county, tribal and federal agencies, including the BIA and the Indian Health Service (IHS). At these workshops, the research team presented project findings. The reactions and comments of the workshop participants helped to provide additional information and insights into the research problem.

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*See Sherman and Morgan, P. C., "Report on Legal and Jurisdictional Problems in the Delivery of Child Welfare Services to Indians," July 1975, available from CSRD.

**See Legal and Jurisdictional Issues in the Delivery of Child Welfare Services to Indian Children on Reservations: Field Study Report (Denver: University of Denver, Center for Social Research and Development, 1975).

CHAPTER 2

INDIAN TRIBES AS GOVERNMENTAL UNITS

## Historical Background

The legal status of American Indian tribes is unique. Within the boundaries of federally recognized reservations, American Indian tribes retain many of the attributes of sovereignty available to states or political subdivisions of states.* These powers include the right to adopt a form of government of their own choosing; to define tribal membership; to regulate the domestic relations of members; to tax; and to control, by tribal laws enforced through the tribal courts the conduct of tribal members, and, in some instances, the conduct of nonmembers while on the reservation.

The origin of this unique legal status dates back to the arrival of European settlers in North America. The governing bodies of the various European settlements concluded formal treaties with the governing bodies of Indian tribes before the formation of the United States. The United States Constitution reserved the responsibility for dealing with Indian tribes solely to the federal government under the clause in Article I which regulates commerce with Indian tribes and under the clause in

---

*The technical term "Indian country" has long been used to define the geographical limits of tribal authority. Throughout this report, the more common term "Indian reservation" is used. The most commonly cited definition of Indian country is found in 18 U.S.C. 1151, especially subsections (a) and (c). Indian country is defined here as including (1) all land within the exterior boundaries of a reservation, and (2) allotted land outside a reservation to which Indian titles have not been extinguished. Within an Indian reservation, all land is Indian country, whether owned by Indians or non-Indians. If the reservation was opened to settlement by non-Indians, non-Indian land is Indian country if Congressional intent was not to diminish the reservation. Allotted land outside the reservation may fit within the definition of Indian country even if the allotted land is checkerboarded--that is, interspersed with land which is clearly not Indian country.

The definition of Indian country is quite complex. In some cases, it may be necessary to examine treaties, federal legislation, legislative history, and court precedent in order to decide whether a specific parcel of land is Indian country or not.

Article II which concerns treaty making. Therefore, the federal government, and not the separate states, is the ultimate arbiter of the legal status of Indian tribes through acts of Congress.

The United States Supreme Court, as the final authority for determining the legal meaning of the federal Constitution, defined the broad principles of federal, state, and tribal governmental authority in two landmark decisions in the early years of the United States in Cherokee Nation v. Georgia and Worcester v. Georgia.

In Cherokee Nation, the Supreme Court considered the validity of Georgia state laws which incorporated Indian lands into existing state counties, prohibited the Cherokee from engaging in political activities, and asserted control over who could pass into or through the tribal lands. The Court found it had no jurisdiction to pass on the major question, but did define the legal and governmental status of the Cherokee Nation by calling it "a domestic dependent nation." This dictum has retained significant force as a description of the self-governing status of Indian tribes.

In Worcester, the Supreme Court established the principle of federal plenary power over the regulation of Indian affairs. It held unconstitutional Georgia state laws regulating the residence of non-Indian persons on tribal lands, thus precluding the exercise of state power in this area. Chief Justice Marsnall further delivered, in dictum, the classic formulation of the theory underlying the principle of Indian sovereignty:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.[1] . . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence--its right to self-government--by associating with a stronger, and taking its protection.[2]
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the laws of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[3]

Thus, from the earliest days, the Constitution and Supreme Court decisions contained clear indications of Congress' plenary power in dealing with Indian tribes and of tribal self-government and sovereignty. Congress continued to recognize attributes of tribal sovereignty by dealing with various tribes through treaties as it embarked upon a policy of removing tribes to the west. In 1871, Congress ended the practice of making treaties.

These are the major historical determinants of the self-governing powers of Indian tribes. Further discussion of the current limits of tribal sovereignty is detailed below, but it is necessary to recognize at the outset the principle that American Indian tribes have substantial powers of self-government in the United States system, which is generally viewed as having only two tiers, federal and state. This is the root cause of most of the legal and jurisdictional issues identified by this study.

Recent Court Decisions

Since the early landmark cases, there have been many political and legal struggles between state governments and tribes about the fundamental question of the scope of tribal sovereignty. Over the last two decades, the Supreme Court has delivered several decisions which support tribal governments in their assertion of jurisdiction and in their rejection of state involvement in the affairs of Indians on reservations.

One of the most important attributes of sovereignty is the power to tax personal income and real property. There has been frequent litigation among states, tribes, and the federal government on the subject of taxation. The first significant decision on this subject is The Kansas Indians, decided by the United States Supreme Court in 1867. This decision held that a state could not impose a land tax on reservation Indians, citing the exclusive jurisdiction of the federal government with respect to tribal Indian persons. Real property taxes by the states on tribal Indian lands are therefore forbidden, and have not been of significant concern in subsequent litigation.

However, the states have attempted to tap various other income sources related to tribal Indian activities, and the Supreme Court has recently handed down three major decisions defining the limits of state and tribal powers.

Warren Trading Post v. Arizona Tax Commission involved the question of whether a state could impose an income tax on profits generated by the operation of a business within an

Indian reservation. The Court held that the federal authority preempted the field, and state law could not validly apply.

Two further clarifications of the respective sovereigns' power in the tax field were issued by the Supreme Court in 1973, Mescalero Apache Tribe v. Jones and McClanahan v. Arizona Tax Commission. The Court held in Mescalero that a state could impose a sales tax on a business activity operated by a tribe on off-reservation land. In McClanahan, the Court ruled that a state could not impose its income tax on an Indian person whose entire income was generated from reservation sources.

The reasoning of the Court in McClanahan is useful in attempting to further define the powers of the state and the Indian governments, because this case is the most recent United States Supreme Court decision directly addressing the question of tribal and state powers. The Court characterizes the issue as the necessity "to reconcile the plenary power of the states over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." It notes that the tribal sovereignty doctrine had not remained static since the Worcester case:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. . . .
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought

> under the laws of the Union or of the State within whose limits they resided."

This modern view of the tribal sovereignty doctrine, plus certain tests formulated by the Supreme Court, lead to general guidelines in assessing tribal and state authority.

The test most recently used was announced by the Court in Williams v. Lee. The issue in this case was whether a state court had jurisdiction over a civil debt claim brought by a trader for a balance due from an Indian customer. The Court characterized the test as "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," if Congress has not specifically acted on the question involved. The ruling was that the tribal court had sole jurisdiction to hear the case.

Many commentators have viewed this test as vague, since it could be argued that any state action affecting an Indian infringes on his right to be ruled by his own laws. It has further been considered a departure from previous case law in that it allowed some leeway for state action if Congress had not acted, thus reversing classical federal preemption doctrine, which requires that Congress give authority to the states before they can act.

However, the test has been applied in certain contexts suggesting that where tribal authority has been exercised, such as by passage of an ordinance or by creation of a tribal institution for dealing with specified issues, the tribal authority has preempted that of the state and must be controlling. For example, in State ex rel Merrill v. Turtle, a federal appeals court held that state officials could not extradite an Indian fugitive to another state if the tribe refused extradition. The Court noted that the tribe had a law permitting extradition, but not to the particular demanding state.

If this formulation gains broader judicial recognition, then it may become somewhat simpler to accurately describe the respective limits of tribal and state authority.

## Federal Legislation Expressing Policy toward Indians

Congress has responded to policy issues over the years by enacting legislation which vacillates between the goals of self-determination or assimilation of Indians. As one might expect, federal laws have not wiped the slate clean with each swing of congressional opinion; thus, remnants of laws are left which are at variance with policy directions subsequently taken.

The practice of Congress in the early years of European settlement of the eastern portion of the United States was generally to remove Indian tribes further west, clearly expressing a policy of separation. Shortly after the treaty-making practice was ended in 1871, Congress began to enact legislation which embodied the goals of assimilation of Indians into Anglo civilization.

The United States Supreme Court had ruled in 1883 in Ex Parte Crow Dog that a federal court had no jurisdiction to try a Sioux Indian for the alleged murder of a fellow Indian which occurred on reservation land. The congressional response to this decision was the Major Crimes Act of 1885, which gave federal courts criminal jurisdiction over certain offenses committed between Indians on reservation lands.

Shortly thereafter, Congress passed the most significant assimilationist legislation of the last century, the General Allotment Act of 1887. This act was plainly designed to break up tribal institutions. It gave the federal executive branch the authority to divide reservation lands into parcels which would be allotted to individual tribal members. Eventually, Indian allottees were to gain full ownership of their allotments and, at that time, were to become citizens fully subject to the ordinary jurisdiction of the state. To a great extent, the assimilationist philosophy of this act was successful, at least in the alienation of tribal lands from their Indian owners. Approximately ninety million acres of land passed out of tribal control during the tenure of the Allotment Act. Further assimilationist aims were expressed by mandatory school attendance laws for Indian children in 1893, which provided that rations could be withheld from Indian families for lack of compliance. In 1924, Congress provided that Indian persons were citizens of the United States and of the states in which they reside.

The impact of assimilationist legislation and policies was far-reaching and, by many accounts, devastating in the cumulative effect on Indian tribal life and culture. Federal policy toward Indians took a sharp turn toward tribal sovereignty with the Wheeler-Howard or Indian Reorganization Act of 1934. The purposes of the bill were variously described as "to stabilize the tribal organization,"[5] "to allow the Indian people to take an active and responsible part in the solution of their own problems,"[6] and "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise."[7] The principal features of the bill ended the practice of allotment, restored land to tribal ownership, provided for tribal self-government under tribal constitutions, and were designed to reduce the need for BIA involvement in internal tribal affairs.

For the next twenty years, these goals of strengthening tribal institutions held sway, but in 1953 and 1954, Congress reversed its direction and enacted the paradigms of the twentieth century assimilationist philosophy, Public Law 280 and the termination acts.

The termination acts put an end to the special federal relationship for the Menominee, Klamath, and Paiute tribes and certain tribes in Texas, and ended all federal services to these tribes. The overall effect of these acts of Congress was to virtually eliminate the tribal status of these Indian tribes.

PL 280, passed by the United States Congress in 1953, gave civil and criminal jurisdiction over essentially all Indian lands within their borders to the states of Alaska, California, Minnesota (except Red Lake Reservation), Nebraska, Oregon, and Wisconsin. It allowed the states of Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington to assume civil or criminal jurisdiction over Indian reservations within their boundaries by other procedures, generally by amending their state constitutions to change provisions which disclaimed state authority over Indian-owned lands within those states. It also allowed other states to enact state legislation to assume either civil or criminal jurisdiction or both.

PL 280 denied authority to any state to encumber or tax trust lands owned by Indians, or other Indian lands subject to federal restrictions against alienation, such as allotted lands.

The state response was as follows:

1. Arizona has extended its jurisdiction only for air and water pollution laws.

2. Florida has asserted exclusive civil and criminal jurisdiction.

3. Idaho exercises civil and criminal jurisdiction with respect to school attendance, juvenile delinquency, dependent and neglected children, mental illness, domestic relations, public assistance, and motor vehicle laws. Other jurisdiction may be asserted witn tribal consent.

4. Montana has extended criminal jurisdiction only over the Flathead Reservation, although other tribes may consent if the relevant county commissioners also consent, and a tribe may obtain retrocession after two years.

5. Nevada assumed civil and criminal jurisdiction, with limited exceptions, in 1955.

6. In New Mexico, a constitutional amendment to assert jurisdiction was rejected in a popular vote in 1969.

7. North Dakota amended its constitution in 1965 and passed legislation assuming civil jurisdiction over tribes or individuals with their consent. Thus far no tribe has consented.

8. South Dakota submitted legislation allowing the governor to assume jurisdiction by proclamation to a referendum vote in 1965, and the proposal was defeated.

9. Utah passed legislation in 1971 to assert civil and criminal jurisdiction, with the condition that Indian consent be obtained.

10. Washington passed legislation in 1957 under which civil and criminal jurisdiction was asserted over nine tribes at the request of the tribes. In 1963 it asserted criminal and civil jurisdiction over all fee patent lands on reservations, with civil jurisdiction asserted over all reservation lands in the areas of school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoptions, dependent children, and traffic laws--all without the consent of the tribes.

No other states have chosen to assert jurisdiction under the provisions of PL 280. Certain eastern states, including New York and Maine, have long asserted jurisdiction on grounds of early state treaties with tribes, special federal statutes, or state establishment of reservations.

Few federal Indian policies in this century have elicited stronger negative responses from Indians than PL 280 and the termination acts. Repeal of PL 280 is still one of the highest priorities of the National Congress of American Indians and other Indian groups. In the past fifteen years, Congress and the executive branch have moved toward repudiating the termination policy in an attempt to strike a balance between the assimilationist philosophy of 1953 and 1954 and the expressed desires of Indian people to retain tribal self-government. Federal policy began to emphasize Indian tribes' own determinations of what they desired to do in governing themselves. In addition, federal funds were increasingly made available to Indian tribal governments.

In 1970, President Nixon declared "self-determination without termination" as national policy. In a message to Congress on

Indian affairs, 8 July 1970, Nixon said:

> Because termination is morally and legally unacceptable, because it produces bad practical results and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new concurrent resolution which would expressly renounce, repudiate and repeal the termination policy as expressed by the House Concurrent Resolution 108 of the 83rd Congress. This resolution would affirm the integrity and rights to continued existence of all Indian tribes and Alaskan Native governments, recognizing that cultural pluralism is a source of national strength. . . . [It would] affirm for the Executive Branch . . . that the historic relationship between the Federal Government and the Indian communities cannot be abridged without the consent of the Indians.[8]

Congress has not passed a resolution renouncing the termination policy, but it did reverse itself by restoring the tribal rights of the Menominee Tribe in the Menominee Restoration Act of 1975.

PL 280 has not yet been repealed. However, it was modified in some respects by the Indian Civil Rights Act of 1968. This act requires due process in Indian tribal law and grants to individual Indians (vis-a-vis their tribes) many of the civil liberties guaranteed to American citizens (vis-a-vis federal and state governments) by the Bill of Rights, including freedom of speech, religion, assembly, and press. The act may be viewed as assimilationist, since aspects of the Bill of Rights are at fundamental variance with Indian tribal law. However, the act recognizes the principle of tribal self-government, by modifying PL 280 to give any tribe not yet under PL 280 the right to reject subsequent state assertion of civil or criminal jurisdiction over tribal lands and members. No tribe has since consented to the extension of state jurisdiction. The act has served to strengthen tribal government by directing subsequent funding to the development of tribal legal institutions.

Many of the most complex issues concerning the lawful spheres of tribal, state, and federal authority arose during the years 1953 to 1968, when certain states chose to assert various forms of civil or criminal jurisdiction over Indian persons within their boundaries. The intricate maze of checkerboard jurisdiction existing in many states, where tribal and state authority are a function of land boundaries and the details of federal and state legislation, is in large part founded on the complexities of state assertion of jurisdiction under PL 280.

## Tribal Courts

Except where PL 280 has transferred all jurisdiction to state governments, most Indian tribes of any size have tribal courts and tribal codes. This law and these courts are as varied as the tribes themselves, and the entire field of Indian tribal jurisprudence is changing rapidly.

Ten years ago, legal resources for reservation communities were severely limited. A tribe might have a general counsel in Washington on retainer, and the BIA employed attorneys who were charged, among other responsibilities, with safeguarding the legal rights of tribes. An individual Indian confronted by a legal problem had little chance of obtaining professional assistance unless he could afford to bear the cost himself. Further, there were few national legal organizations devoted to the protection of Indian rights, no Indian law report to compile current judicial and administrative cases, no up-to-date Indian law library readily accessible to the public, few Native Americans trained as lawyers, and no national tribal judges association.

These conditions have changed, primarily as a result of the creation of an Indian Legal Services Program in the Office of Economic Opportunity (OEO) and the passage of the Indian Civil Rights Act. OEO created federally-funded legal service organizations on or near reservations, providing legal assistance to indigent Indians on reservations for the first time, with dramatic results.

Many of the recent cases discussed in this report were brought by legal services organizations. These organizations included funding for tribal lay advocates in tribal court; the continuing interaction of these advocates with tribal courts, both as advocates and legal consultants, resulted in improved court procedure. The legal services organizations sometimes proved quite powerful. The largest, DNA, which operates on the Navajo Reservation, had seventeen attorneys and twenty-eight Navajo lay advocates in 1970, has since added two more offices, and is funded at well over a million dollars annually.

The growth of legal resources on reservations also stimulated the development of backup institutions to support tribal court systems. In 1969, the National American Indian Court Judges Association was incorporated; in 1970 the association undertook the establishment of a training program for all Indian court judges who cared to participate. In 1971, the Native American Rights Fund (NARF) was established in Boulder, Colorado with a Ford Foundation grant. NARF employs attorneys to bring test cases and to act as a central legal resource for Indian communities and legal services organizations. In 1972, the

National Indian Law Library was established at Boulder through a Carnegie Foundation grant; it is the first public access library to catalogue all available Indian legal materials on an ongoing basis. In 1974, the American Indian Lawyers' Training Program began publishing the monthly Indian Law Reporter, which is cross-referenced to the National Indian Law Library at NARF. In 1974, Congress finally appropriated money pursuant to the Indian Civil Rights Act of 1968 to publish a compilation of all solicitor opinions since 1917 and an up-to-date version of all statutes, executive orders, and proclamations from June 1938 through 1970.

The number of Native Americans trained as lawyers has also increased sharply. In 1974, there were 180 Indian attorneys and 144 Indian students were attending law school.

The passage of the Indian Civil Rights Act in 1968 had an important impact on tribal courts and tribal law. In its wake, numerous court cases have arisen, testing the meaning of the act and reshaping tribal court procedure. The act has served to focus greater attention upon Indian law itself and thus to channel more money into Indian legal institutions. Unfortunately, Congress neglected to make appropriations pursuant to the act to tribal courts so that they might institute the new procedures.

Notwithstanding these rapid changes in Indian jurisprudence, there are wide variations among tribes in the degree to which traditional legal systems have been translated into or replaced by written codes and procedures similar to those of state and county courts. The Navajo Reservation, for example, has numerous courts and well-developed civil and criminal codes, which include sections on adoptions and other child welfare matters. The Zuni Reservation, thirty miles distant, has only recently adopted a law and order code and has no written civil code. In this context, generalizations can be misleading when applied to specific situations. Several generalizations can be made, however.

Most Indian courts handle a wide range of civil and criminal problems with severely limited resources. As Alan Parker has reported:

> In a very practical sense, the tribal courts are facing real difficulties in coping with the scope of issues the federal courts have recently defined as being within their jurisdiction. That is, while they have been accustomed to operating with procedures and practices comparable to a justice of the peace court on a state level, they have the responsibility to exercise authority comparable in many ways to a state or federal district court.[9]

In dealing with the complex legal issues of defining tribal sovereignty or tribal jurisdiction, one tends to forget that the reservation community in question may number only 3,000 persons living in a rural setting. More often than not, the members of that community are impoverished, the resources of the tribal government limited, and the formal educational attainments of those members limited. None of these factors would be surprising in any small rural community. In Indian communities, an additional factor is that tribal culture is often markedly different from that of the predominant society.

Few tribal judges are trained lawyers. The Model Code for Indian tribes proposed by the Interior Department in 1975 includes no education requirements. Alan Parker writes about tribal judges and courts in Montana:

> Generally, the judges are highly respected members of the tribal community but with little or no legal background. On the whole this writer has also found that they possess a deep understanding of their own people and appreciation of their distinctive needs in the administration of a judicial system within the tribal society.[10]

Tribal courts are often courts of limited record. Sometimes, state courts that receive tribal court records only receive a simple form without pleadings filed or a written record of findings of law and fact. The tribal court's file generally will contain a complaint on a standard court form, sometimes a written answer, and findings and judgment. For example, the Flathead Tribal court (in 1972) had its proceedings in a bound minute book with each action described in a short paragraph. Other tribes have tape-recorded sessions or more complete record-keeping procedures. The proposed Model Code contains warrant, summons, subpoena, and judgment forms but has no requirement for record keeping.[11]

Tribal codes as a group are notoriously difficult to locate for research, information, or comparative purposes. Althougn many are available at the National Indian Law Library in Boulder, Colorado, and at the American Indian Law Center of the University of New Mexico, no agency has a complete, up-to-date collection available for purposes of public access. There is no published compilation of tribal codes. Alan Parker, writing in 1972 about tribal courts of the seven Indian reservations in Montana, commented:

> Information as to the . . . present practices and procedures of the tribal courts in Montana is available through contact with the Bureau of Indian Affairs, Washington, D.C. or the Bureau's area office located in Billings, Montana. . . . Unfortunately, as this author found, even the BIA does not always have adequate and up-to-date information in this area. In the absence of the publication of an authoritative and a thorough study detailing this information, verification of much of this information can only be accomplished by personal visit with the tribal officials.[12]

The physical facilities available to many tribal courts are quite limited. Joseph Mudd's physical description of an Indian court is representative:

> The judges do not have private office space at the tribal jail where the court is located. The courtroom, at the time the author saw it, was a large room totally without furniture except for a permanent desk for the judge on a slightly raised platform in the corner of the room.[13]

Aspects of due process that exist in state or federal courts, and rules of evidence, may not exist in tribal court. A defendant, for example, is not entitled to a court-appointed attorney, although he is entitled to counsel under the Indian Civil Rights Act. Another example:

> The judge may play a more direct role in which he himself thoroughly questions the complaining witness and defendants and allows the jurors (if it is a jury trial) to direct questions themselves. In such a scheme, the counsel or advocate would be permitted to question witnesses only after the court had completed its own examination. Proceeding in this manner might well eliminate the many objections and legal arguments which so characterize trials in American courts, but still guarantee a fair trial.[14]

The requirements of the Indian Civil Rights Act for due process in tribal courts are discussed in more detail in chapter 4.

One final comment about tribal courts may serve to complete the picture of their practical operations. The Indian Civil Rights Act limited tribal courts to imposing, for any one offense, a maximum penalty of imprisonment for six months or a $500 fine or both.

In short, Indian jurisprudence is changing very rapidly, with some tribes developing the elaborate written procedures and formal training characteristic of state court systems. Many tribal courts, however, are just beginning this process.

## The Provision of Public Services by Tribal Governments

One of the most important aspects of the self-determination movement has been the rapidly increasing volume of public programs administered by tribal governments. Some Indian tribes have been able to finance services from their own income, primarily from royalties on tribally-owned mineral rights. But most reservations lack a solid economic base, and most tribal governments have very limited sources of revenue. Therefore, most of the public services provided by tribes are supported by federal funds.

Initially, Indian tribes looked solely to the Commissioner of Indian Affairs for federal programs directed toward them; the office of the commissioner was established in 1832. Within the wide latitude permitted by the Snyder Act, passed in 1864, the BIA had full discretion to implement programs dealing with Indians in almost any area of government. These programs were administered by BIA employees; contracting with tribes was unknown.

In 1936, the Indian Reorganization Act (also known as the Wheeler-Howard Act), established, in federal law, guidelines and procedures for the reorganization of tribal government. Prior to this time, Indian tribes were governed by a variety of mechanisms, some traditional and some incorporating such Anglo features as written constitutions and representative government. Section 10 of the act, which created an Indian Revolving Loan Fund for economic development, was one of the first instances of a policy of direct funding by the federal government to tribal corporations.

In 1954, the BIA was divested of its programs of medical services by Congress and the program was transferred to the United States Public Health Service. The impetus for this change was that the

BIA had difficulty recruiting medical personnel; the Public Health Service seemed more suited to the job. The result, however, represented a more fundamental change:

> the transfer was another nail driven in the coffin of the Indian Bureau's dominance of the reservation scene. In place of the monolithic BIA reservation power structure, there were now two Federal agencies, independent of each other, on the reservation: the Indian Bureau and the U.S. Public Health Service.[15]

Indian tribes had been fearful that the proposed transfer was a step toward termination and had opposed it, but their fears proved unfounded. One of the most striking results of the transfer was an immediate two-fold $21 million increase in appropriations for Indian health needs, with further increases in the following years.

In the 1960s, many federal agencies besides the BIA and IHS became involved in programs for Indians. During the presidential campaign of 1960, both John F. Kennedy and Richard M. Nixon committed themselves to Indian reservation development. After the election, several federal agencies turned their attention to Indian reservations. Federal grants and contracts at all levels of government increased dramatically during the 1960s, and Indian tribes were among those receiving greater volumes of federal aid.

In 1975, Congress addressed the issue of contracting BIA and IHS programs to Indian tribes. The Indian Self-Determination Act of 1975 provides that when a tribal government so requests, the BIA or IHS must contract with the tribe to administer the requested BIA or IHS programs or must provide the tribe with capacity-building funds to enable it to enter into a contract at a later date. The regulations for this legislation have not been published and no contracts have been let under the act. However, this legislation has the clear potential for a major impact on the self-government of Indian tribes.

## Impediments to Contracting with Tribal Governments

Frequently, federal or state grant programs are drafted in such a way that it is unclear whether Indian tribes are potential recipients. The failure to specifically include Indian tribes may represent legislative oversight. The question is often whether the legislature intended to subsume Indian tribes under such terms as "political subdivision," "local agency," or "unit of local government."

The failure to specifically include Indian tribes results in confusion and delay when tribes ask whether they may receive government grants. In government agencies, a pattern sometimes develops over a period of years: separate administrative interpretations are made that tribes are qualified; then a central administrative interpretation follows; and eventually regulatory or statutory language is added to conclusively resolve the issue.

During the 1960s and 1970s, this process has been repeated in a number of federal agencies. In 1961, the chief counsel of the Public Housing Administration determined that the statutory language "any state, county, municipality, or other governmental entity or public body" included Indian tribes. On 22 September 1961, as a result of this interpretation, the first federal loan to an Indian public housing authority was made. In 1968 the act itself was amended to specifically include "Indian areas" within its purpose section.

In May 1961 the Area Redevelopment Act was passed. As a result of pressure from the Montana delegation, the act provided that a "redevelopment area" specifically included Indian reservations.

In 1962, Congress passed the Public Works Acceleration Act. Within a month, the act was amended in a measure sponsored by Senator Lee Metcalf of Montana to specifically include Indian tribes. In one place, Indian tribes were specifically added as permitted federal debtors; in another an Indian tribe was subsumed under the term "smaller municipality."

The Economic Opportunity Act, embodying the War on Poverty programs, authorized grants to community action programs (CAPS) established by Indian tribes. For the CAP program, Indian tribes are now specifically subsumed under terms such as "public agency," "community," and "political subdivision of a state."

Indian tribes are now eligible for grants from the Department of Justice under the Juvenile Delinquency Prevention and Control Act where they are subsumed specifically under the term "public agency." By a 1971 amendment, Indian tribes are included under the term "unit of general local government," permitting them to obtain grants from the Omnibus Crime Control and Safe Streets Act.

Despite the fact that several federal agencies have, by administrative ruling, regulation, or statute, specifically included Indian tribes as potential recipients of federal programs, the general situation today is uncertain and confused.

In 1974, the National Council on Indian Opportunity (NCIO), a temporary federal commission chaired by the Vice President, issued a report entitled "Inventory and Analysis of Indian Tribal Participation in Federal Domestic Assistance Programs." Among its conclusions were the following:

> Only 86 domestic assistance programs (14%) from a potential universe of 600 are presently being utilized by federally recognized Indian tribes. Of the 86 programs in which Indian tribes are participating, only 43 of these programs (50%) were utilized by more than one tribe.
>
> There is no organized, positive, affirmative federal effort to, on a thrust basis, create an awareness of potential, and generate extensive utilization of available federal domestic assistance programs to improve tribal economic and social status. [16]

The NCIO mentioned the "public agency" problem in the following language:

> One of the problems faced by Indian tribes when applying for assistance under Federal programs is the lack of consistency in the way tribes are viewed by the various government agencies. A tribe meeting the legislative requirements for one agency's program may be precluded from participating in another agency's program--with the same legislative requirements--due to different statutory interpretation by the administering agency. [17]

In addition, the report commented upon the adequacy of the Catalog of Federal Domestic Assistance for tribal purposes:

> [The tribes] pointed out that the catalog was written to serve a city, county or state governmental unit. In most instances requirements did not extend any consideration to the unique position of Indian tribes. . . . It became evident . . . that some effort should be made to develop a substitute or better yet--a reference tool designed exclusively for the use of Indian tribes. [18]

The Department of Health, Education, and Welfare's child welfare programs conform to this general pattern. There is no explicit statement in the Social Security Act or in the regulations which designates Indian tribes as public agencies to whom appropriate activities may be contracted. There have, however, been determinations to this effect at the regional level.

DHEW regional attorneys in Region VIII and Region IX have on two separate occasions determined that Indian tribes are to be

considered public agencies within the meaning of the Social Security Act. In the instance of Region IX, the regional attorney's opinion contained a statement that the Human Resources Division of the Office of General Counsel "concurs in these conclusions."[19]

The Region IX attorney's opinion of 12 November 1973 was in response to an inquiry by the associate regional commissioner as to whether federal funds could go directly to the Navajo Nation as a public agency within the meaning of Titles IV-A and VI, in implementing the Navajo Social Services Demonstration Project. Among the authorities used for the decision were the Handbook of Federal Indian Law, the Federal-State Revenue Sharing Act, and Older Americans Comprehensive Services Amendments of 1973. The Revenue Sharing Act, for example, contains this definition:

> The term "unit of local government" means the government of a county, municipality, township, or other unit of government below the state which is a unit of general government (determined on the basis of the same principles used by the Bureau of the Census for general statistical purposes). Such term also means . . . the recognized governing body of an Indian tribe or Alaskan native village which performs substantial governmental functions.[20]

The Region IX attorney's opinion concluded that:

> in view of the recognized principle that Indian tribes exercising substantial governmental functions independent of a state possess the attributes of a limited sovereignty, and in light of the above referenced Congressional mandates directing the Secretaries of certain federal agencies under specified circumstances to recognize the governing body of an Indian tribe as a "unit of local government" (i.e., a public agency) . . . [it follows that] . . . tribal funds could be considered public funds for purposes of federal financial participation under Titles IV-A and VI of the Social Security Act.[21]

The "public agency" problem is not confined solely to the federal government and federal statutory interpretation issues. It also appears when a state agency wishes to contract with an Indian tribe. To permit such a contract, the Arizona legislature had to pass a statute enabling the state agency to contract with an Indian tribal council,

where the council was defined as a "public agency." Two states, South Dakota and Arizona, have recently dealt with this problem by passing blanket statutes which define Indian tribes as public agencies for purposes of all intergovernmental contracting.

Summary

This brief summary of the legal and constitutional status of Indian tribes and of federal policy toward Indian tribes shows that the United States government has never settled on a consistent view of the status of Indian tribes within American society or within the American governmental structure. The periodic attempts to define the limits of federal, state, and tribal sovereignty lack clarity and are subject to variation as the guiding philosophy changes. It is possible, however, to summarize the legal status of tribal governments in a few general principles:

1. Under the Constitution, the federal government, acting through the United States Congress, is the final determinant of tribal Indian powers.

2. Federal legislation defining tribal Indian status to date has been inconsistent as federal policies shifted between the goals of assimilation and self-determination.

3. For the last decade or more, both Congress and the executive branch have moved toward strengthening the powers of Indian tribes for self-government, particularly by increasing the volume of federal funds flowing to tribes through grants and contracts.

4. In states where PL 280 has not limited tribal jurisdiction, tribal governments have very substantial powers to govern affairs within Indian reservations. Tribes under PL 280 retain important governmental powers, such as powers to levy income and property taxes.

5. In view of the complexity of the legal status of Indian tribes, resolution of any given conflict in asserted authority between tribes and states generally requires an examination of treaties, acts of Congress, state statutes, federal and state court decisions, tribal law, and various governmental regulations.

# CHAPTER 3

## CHILD WELFARE SERVICES ON RESERVATIONS

### Introduction

At many points, the provision of child welfare services involves courts, police, and licensing authorities. Tension between states and tribes over spheres of authority thus has a direct impact on child welfare matters on reservations. One state welfare administrator summarized the situation as follows: "There are disputes between states and tribes in all areas--fishing rights, water and land disputes--so that nobody wants to make a decision or commitment about jurisdiction. Everyone is tiptoeing around because they're afraid to establish a firm precedent."

Two major findings of the field research were that (1) on many reservations, there are legal and jurisdictional problems involving licensing, acceptance of tribal court orders, and the proper roles and responsibilities of different agencies; and (2) the practical consequences of these jurisdictional difficulties are often that SRS child welfare services are not available to reservation Indians on the same basis as they are available to other citizens.

This chapter describes the child welfare services provided by public agencies to the ten reservations included in the field study (see table 1). Child welfare services funded under Titles IV-A (now XX) and IV-B of the Social Security Act are provided on these reservations through twenty-six county welfare departments or local offices of state social service departments. The ten reservations overlap with eight states.

It should be stated at the outset that these state-county systems do provide child welfare services to non-Indian residents of reservations and find no legal or jurisdictional impediments in doing so. Limitations are only for services to Indian people.

The BIA also provides child welfare services on nine of the ten reservations. On the tenth, Yakima, the state of Washington has asserted jurisdiction over all child welfare matters under PL 280, and the BIA role is limited to information and referral. None of the other reservations visited is covered by PL 280. On three reservations, Zuni, Navajo, and Gila River, the tribe is directly involved in providing child welfare services.

TABLE 1

FIELD RESEARCH SITES

| Reservations | Counties | States |
|---|---|---|
| Crow | Big Horn<br>Yellowstone | Montana |
| Ft. Berthold | Dunn<br>McKenzie<br>McLean<br>Mercer<br>Mountrail | North Dakota |
| Ft. Peck | Daniels<br>Roosevelt<br>Sheridan<br>Valley | Montana |
| Gila River | Maricopa<br>Pinal | Arizona |
| Navajo | Apache<br>Coconino<br>Navajo<br><br>McKinley<br>San Juan | Arizona<br><br><br><br>New Mexico |
| Red Lake | Beltrami<br>Clearwater | Minnesota |
| Rosebud | Mellett<br>Todd<br>Tripp | South Dakota |
| Standing Rock | Carson<br><br>Sioux | South Dakota<br><br>North Dakota |
| Yakima | Yakima | Washington |
| Zuni | McKinley | New Mexico |

The field research team interviewed each of these service-providing agencies, plus tribal and state court judges, tribal chairmen, BIA area social workers, state officials, federal regional office personnel, and others.

Before turning to the patterns of service delivery on the ten reservations, it will be helpful to note some of the recent controversy about the substance of child welfare services on Indian reservations.

## The Substance of Child Welfare Services for Indians

In recent years, tribal governments have become increasingly assertive in trying to stop the placement of Indian children in non-Indian adoptive and foster homes. On many reservations, the number of off-reservation placements had risen to remarkably high levels. In April 1974 the Senate Subcommittee on Indian Affairs held hearings on Indian child welfare, at which tribal officials, staff of the Association on American Indian Affairs, child welfare professionals, and Indian parents testified bitterly about placements with non-Indian families. At the Senate hearings and elsewhere, many have argued that Indian children have been taken from their homes without cause, against the wishes of their families and their tribes, and that little effort has been directed toward recruiting Indian foster and adoptive families. Because the number of white children available for adoption has dropped drastically in recent years, Indian children are in great demand.

Senator Abourezk, chairman of the Senate subcommittee, summarized the testimony at one point:

> Witness after witness got up and testified that non-Indian social workers have been totally ignorant of exactly what an Indian family is and what it ought to be; that their standards, referring to non-Indian social workers, the standards they develop on whether or not a mother was a good mother or a parent was a good parent, were based on their own standards, not on Indian standards, which are quite often different, and that as a result judging the fitness of the parent or the closeness of the family unit on their own standards, that they then took all kinds of illegal, deceptive actions to try to get Indian children away from their mothers.[22]

The North Dakota Social Work Manual refers to the concern about placements of Indian children with non-Indian families.

> By tribal resolution, press release, and otherwise the Indian people have made known a concern over the removal or possible removal of Indian children from the reservation to a non-Indian culture off the reservation. This concern is also to be recognized and respected.[23]

The placement of Indian children in non-Indian homes is not a new phenomenon. Beginning in the 1880s and continuing in some cases until recently, children attending BIA boarding schools have often been placed with white families during the summer vacation in an effort to break the children's ties with home. Beginning in 1958, the BIA and the Child Welfare League of America supported an Indian Adoption Project, which has placed hundreds of Indian children with white families on the East Coast and in the Midwest, far from their home reservations.

Efforts to halt placements of Indian children with white families have raised many legal and jurisdictional issues. Most tribal courts have become reluctant to approve off-reservation placements. Some placements through state courts have been challenged on grounds that jurisdiction lay with tribal courts.

Many tribal councils have passed resolutions opposing off-reservation placements and have made it quite clear that state and county social workers are not welcome on reservations when they come on this business. Often this has made state and county social workers reluctant to provide any child welfare services on reservations, but as one tribal council member put it, "Keeping our children was worth not getting services."

In addition to controversy about placements of Indian children in non-Indian homes, one must consider the nature of family relationships in Indian cultures. Extended families are very strong in many tribal cultures. The full implications of this for child welfare systems, which are geared primarily to the nuclear family system, are rarely articulated. Many Indian cultures make no distinction between the nuclear and extended family; family is family. Thus what an Anglo social worker might regard as a long-term foster care placement with a "distant" relative, and a child in need of an adoptive home, is, in the Indian context, a child already living with his family. There may be difficulties in reconciling Anglo law in matters of legal responsibility, liability, and inheritance with such

a situation, but in the Indian context, the child is not suffering from deprivation of familial support.

A second difference between Indian and non-Indian children concerns the relationship of the child to his community. Much of an Indian person's identification and sense of belonging comes from his relationship to his tribe. Thus a child who is living with other members of his tribe but not with relatives may, nonetheless, be receiving the benefits of normal child-rearing patterns and support necessary for total development within his own culture. Also, the tribe has more substantial interests in the welfare of its members than the typical Anglo community has in the welfare of its residents.

Another difference is the concept of adoption itself. Several Indian respondents in the field research stated that adoption, in the sense of taking a child into one's family, is a traditional Indian practice. What is unfamiliar is the Anglo concept that this requires terminating all relationship to the natural parents. Many tribes have made provision for adoptions but have not included what, to Anglo thinking, is an essential component of adoptions--the legal termination of the relationship between child and natural parents.

The patterns of service provision described below are influenced strongly not only by legal and jurisdictional difficulties but also by controversy and disagreement about the proper content of child welfare services on reservations.

## Protective Services

Protective services include a broad range of activities, such as investigating reports of child abuse or neglect, initiating court action for removal of children when necessary, responding to emergency situations involving police or courts, and counseling and supportive activities. Some of these activities require reaching out to provide services, often against the wishes of the parents, rather than merely waiting until cases arrive at the social worker's door.

Most county and BIA agencies report that they do provide some protective services on reservations. Three tribal governments, Zuni, Navajo, and Gila River, provide some protective services. Although some agencies reported small protective service caseloads, many reported higher caseloads for protective services than for all other child welfare services combined. Three counties each reported having provided protective services to over 100 on-reservation

children during 1974; one BIA agency reported over 500 protective services cases during the same period. The Gila River Child Protection Agency reported the greatest number of cases among the tribal programs; protective services were provided to 264 children in 1974.

The scope of protective services provided by many agencies is quite limited. One-third of the county respondents stated their agency either provided no protective services on reservations or that their involvement was limited to making referrals to the BIA or accepting only those cases heard in district courts (for example, children or youth picked up off the reservation and placed off the reservation). Furthermore, almost every county involved in protective services reported that these services were provided only to active Aid to Families with Dependent Children (AFDC) cases. All other potential protective services cases coming to the attention of county workers were referred to the BIA or, by agreement, to a tribal agency or other tribal body (for example, a health and welfare committee).

Many of the counties which reported limited activity in the field of protective services cited, as an explanation, their lack of jurisdiction under PL 280 over Indian reservations. In most of the states studied which are not under PL 280, state policy has been that the aggressive investigation and pursuit of protective services requires jurisdictional authority which their states do not have. Therefore, in these states, county workers seldom or never take the initiative in investigating complaints prior to court action, frequently will not file petitions requesting court action, and often will not accept custody of an on-reservation child even if requested by the tribal court to do so. Instead, their involvement usually begins either with a tribal court order requesting services (not involving custody) or a voluntary service request from parents. Hence, mandatory provision of services to protect reservation Indian children is not the usual procedure with counties in non-PL 280 states, even for open AFDC cases.

It should be noted, however, that the study data do not support the conclusion that either more or fewer protective services on reservations result from a state having jurisdiction under PL 280. This study included only one reservation under PL 280, so obviously no generalizations about services in PL 280 states can be drawn from such limited data.

All BIA agencies except Yakima, where the state has jurisdiction for child welfare under PL 280, provide a variety of protective services. Almost all BIA social workers indicate that they investigate complaints prior to court orders and bring situations to the attention of the tribal court. The most serious barrier to service provision mentioned by the BIA social workers was lack of time to follow up on all complaints and lack of training to provide needed specialized casework services. In a small number of instances, county respondents reported providing casework consultation to BIA social workers on protective services cases. Nonetheless, many BIA social workers felt the counties should take a more active role in actually providing protective services.

As a result of these factors, those protective "services" actually provided apparently often consist of a complicated chain of referrals and interagency dialogue between the BIA and counties, with few tangible services provided. Further, the counties' reluctance to get involved before court action and the BIA's lack of manpower and time to follow up on complaints usually result in situations where protective services are provided only on an emergency or short-term basis after a crisis has already erupted. Respondents commented that besides obviously not being in the interests of children's physical well-being and safety, this also severely hampers their efforts to successfully reunite families. As one county social worker explained: "We meet the family after the tribal court orders the children removed. We have no chance to work with the family to see if foster care can be avoided. At the point we become involved, we have little opportunity to establish a positive relationship with the parents, as they see us as the people who have come to take their children away, not as people who would like to have helped them stay together or to get back together."

In summary, many respondents expressed a great deal of concern about their feeling that the protective services that are provided too often have the effect of further disintegrating families rather than preventing breakdown or reuniting them.

## Foster Care

Foster care in various types of settings has long been seen as an answer to the child welfare needs of reservation Indian children. In the past, there were many formal placements by social service agencies in foster family

homes off the reservation. Also, many Indian children lived in group living situations such as boarding schools and dormitories, either under BIA or church-related auspices. While substantial numbers of children were living with relatives on the reservation in what "outside" service personnel might call "foster care arrangements," social service agencies seldom devoted a major effort to deliberate use of on-reservation resources for the care of children away from their natural parents. Often an enunciated philosophy was that removal of the child from the reservation was a beneficial part of the treatment program. In other cases on-reservation placements were simply overlooked or discarded because they were not readily available.

The past decade has seen the emergence of strongly expressed tribal feelings against the removal of tribal children from the reservations. The current time appears to be one of transition, with old patterns of large-scale removal greatly diminished but, except in a few places, without a well established alternative system.

The current situation with regard to formal foster care services is complex. All BIA agency offices except Yakima and all county offices but two reported that they were involved in some way in providing foster care services on reservations. The actual extent of involvement varies widely. The following paragraphs describe the activities of BIA and county agencies in recruiting on-reservation foster homes, in licensing these homes, and in making off-reservation placements in family foster care and in group care.

Recruiting On-Reservation Foster Homes. Both counties and BIA agency offices are involved in working with on-reservation foster homes, but because of legal and jurisdictional issues, most counties are much less active than BIA agencies. Except for the Yakima Agency, all BIA agencies recruit and approve on-reservation foster care homes for their own use. BIA agencies also refer homes for state approval or licensing and use. Except for Yakima, each BIA agency has its own local child welfare budget for foster care payments to on-reservation foster care homes. Data on numbers of approved on-reservation homes and children in active foster care caseloads were provided by only half of the BIA agencies. The Gila River Agency reported twenty on-reservation BIA-approved foster homes; the Fort Peck Agency reported twenty-six foster homes; the Standing Rock Agency reported forty foster nomes; and the Navajo BIA agencies reported about fifty foster homes.

Licensing On-Reservation Foster Homes. Roughly one-third of the county respondents stated that they do not license foster care homes on the reservation, either because their state does not have jurisdiction for licensing on the reservation or because their jurisdiction is in dispute. The involvement of these counties is limited to two activities: (1) placing children from the reservation in off-reservation foster care upon the request of the tribal court and/or the BIA; and (2) making AFDC grant payments to children in relatives' homes. These grant payments, unlike AFDC foster care payments, do not require court-ordered placement, do not require a licensed home, and do not require post-placement services. All that is involved is a money payment in the form of an AFDC grant to the caretaker relative.

In the other two-thirds of the counties there is the potential for greater involvement. Officials in ten counties state they will license foster care homes on the reservation at the request of the tribe. Five more will approve foster care homes studied and recommended by the BIA or by tribal offices. These homes then qualify as licensed facilities and can receive AFDC foster care placements. A small number of county agencies indicated that they have gone beyond the concept of "licensing on request" to conduct active recruitment of on-reservation foster care homes.

The number of homes licensed by counties varies widely. Forty licensed homes were reported on the Rosebud Reservation, fourteen homes on Yakima, eight on the South Dakota side of Standing Rock, and from one to five licensed homes were reported on four other reservations. Three of the counties which stated they could license or had licensed homes reported no currently licensed homes on reservations in their counties.

An important problem regarding foster care licensing is that of standards. Many tribal respondents stated that state standards for foster care homes, especially sections on physical facilities, were unnecessarily and unrealistically stringent. Many tribal officials expressed the desire to have input into the formulation of standards for homes on reservations. Several state officials expressed willingness to modify standards to suit reservation conditions but stated that some tribes showed little interest and that federal officials did not fully understand the problem. One state official reported that federal officials had turned down an inquiry by his state about exempting on-reservation Indian homes from certain state standards for physical conditions in foster homes, on the grounds that "dual" standards were not permitted.

Off-Reservation Placements. Off-reservation placements in foster homes or group care facilities usually involve state or county offices. In five of the eight states studied, BIA area offices contract with state departments of social services and/or state departments of institutions for off-reservation placements of non-AFDC children. These contracts generally provide for reimbursement to the state of the costs of services and payments to foster care families or facilities. BIA area offices also contract with private group care facilities for off-reservation care and with tribally-run group care facilities on reservations.

There is a relatively clear pattern in the contracts between the BIA and the states. In general, the BIA has contracts with states not under PL 280. The two exceptions, of the eight states studied, are Montana and Minnesota. Montana is not a PL 280 state, but there is no BIA-state contract. The other exception is Minnesota. It is a PL 280 state, but there is a BIA-state contract which is currently being phased out.

All of the county offices surveyed indicated that they place reservation children in off-reservation foster care only at the specific request of the BIA agency office and/or the tribal court. Most indicated that they work with tribal courts in all custody matters involving reservation children. The tribal officials and tribal judges whom we interviewed stated that they believed counties were no longer making placements off the reservation without tribal permission, but that there is concern about children who were placed off the reservation before tribes began to object to this practice. One county reported that forty-one children were still in long-term foster care with non-Indian families off the reservation. Four of these children were living out of state. Another county stated that fourteen "before tribal resolution" placements were still in force. A few tribal respondents reported successful negotiations to have some of these children returned, while others spoke of possible legal action to return the children.

The Roles of BIA and County Offices. There is no clear division of responsibility between BIA and counties along the lines of on- or off-reservation placements. Many respondents suggested as a rule of thumb to explain the division of responsibilities between BIA and states that states or counties take responsibility for AFDC children and that the BIA takes responsibility for non-AFDC children.

This rule of thumb works very well for financial assistance. The BIA's financial assistance program provides supplementary support for persons not eligible for AFDC or other federally

supported financial assistance for the general population. BIA general assistance is a residual program covering eligible Indian persons who are not benefiting from DHEW financial assistance programs.

The BIA manual states that its service programs are also residual programs:

> It is the position of the Bureau that the general welfare of the Indian child is best promoted when the appropriate state agency provides necessary social services to Indian children on the same basis as others. The promotion of state services for Indian children will require the closest possible relationship with State and local Departments of Public Welfare. . . . A program of social services and assistance for Indian children shall be provided, as required, by the Bureau of Indian Affairs within the limits of available resources, only after determination of what part, if any, of the necessary services or assistance is available through other resources.[24]

The AFDC/non-AFDC division of responsibilities between BIA and counties describes fairly accurately the current division of foster care responsibilities on most of the reservations studied. There are some exceptions to this pattern. For example, counties which do not license or approve on-reservation Indian foster homes cannot use these homes for AFDC foster care placements. These counties can provide foster care to AFDC children only by making off-reservation placements in licensed homes or by supporting the children on the reservation with relatives through an AFDC grant.

The distinctions between AFDC foster care payments, AFDC grants to relatives, and BIA foster care payments are important because each category has different rate structures. Usually AFDC foster care rates are far higher than AFDC grants paid to relatives. In several cases, respondents reported that AFDC foster care rates are higher than BIA rates also, even though BIA foster care rates are based, according to the BIA manual, on AFDC foster care rates. Respondents pointed out that these discrepancies are not always based on different types of quality of service, even in the eyes of the service providers, and that this causes much suspicion and distrust.

Another difficulty with the AFDC rule of thumb is that on some reservations, the open opposition of tribal councils to off-reservation placements, the complexities of

arranging licenses for on-reservation facilities, and the widespread perception that services on the reservation are somehow a federal responsibility, have caused some county officials to be very cautious in involving themselves in foster care cases on reservations, even if the family is on AFDC.

If states did not provide child welfare services to non-AFDC Indian children, this would violate the provisions of the Title IV-B program. Through this program, SRS provides some financial support to state child welfare programs targeted at the general population. As of 1 July 1975, states are required to provide these services on a statewide basis. Even prior to this date, it might be difficult to justify excluding from the program on-reservation non-AFDC Indian children because of equal protection arguments. However, several SRS officials stated that federal enforcement of provisions concerning Title IV-B programs was hampered by the fact that SRS provides only a small portion of the total cost of these programs. Most states spend far more on their IV-B programs than is necessary to qualify for the federal matching funds.

Summary. A discussion of who provides foster care services on the ten reservations must conclude that there is no simple generalization regarding the division of responsibilities for foster care between the BIA and the state-county system. With some exceptions, the BIA tends to provide foster care services to non-AFDC cases, leaving AFDC cases to the counties. In most of the states which lack jurisdiction on the reservation, the BIA reimburses the state for off-reservation placements of non-AFDC children. On some reservations, there is misunderstanding or disagreement about the roles of different agencies. The structure of rates for foster care payments is very complex and in some cases arouses distrust and fear of discrimination. Jurisdictional difficulties with the licensing of on-reservation Indian foster homes cause confusion and disagreements about roles and responsibilities.

## Residential Services

On many reservations, special difficulties exist in arranging care and treatment of Indian children with special needs. In very few instances are specialized facilities available on the reservations for mentally retarded or emotionally disturbed people, physically handicapped children, or delinquent youth. For children with these special needs, the only resource is an off-reservation institution or group care facility, usually a state institution.

In all of the states studied except for Washington, Montana, and Minnesota, the BIA is involved in reimbursing the state for some kinds of off-reservation group or institutional care. However, even when the BIA is willing to shoulder a large part of the financial burden, there are serious obstacles to the use of specialized residential facilities in many states.

In some states there is no consistent policy or pattern regarding the use of state institutions by on-reservation children. In these instances service workers must negotiate the issue on a case-by-case and institution-by-institution basis.

Often difficulties arise over the question of court-ordered involuntary commitments to state institutions. In almost half of the states studied, tribes and social service respondents reported that it was difficult or impossible to make involuntary commitments of tribal residents to state institutions. Some state institutions will not accept tribal court orders, and state courts will not order involuntary commitments of tribal persons; hence there is no avenue for securing an involuntary commitment. In a few cases state institutions will "accept" an initial tribal court order but regard it as nonbinding once the individual leaves the reservation and enters the institution, claiming that at the point the individual leaves the reservation, he is no longer under the jurisdiction of its court.

There have been efforts to deal with this problem. During its last session, the Montana state legislature passed a bill requiring certain juvenile facilities in the state system to honor tribal court orders for commitment. The issue that remains is who has responsibility for payment for juveniles committed under the new law. The state asserts it to be the responsibility of the tribe or the BIA on a purchase-of-service basis from the state, while the BIA urges that the state accept responsibility.

Adoptions

Both BIA and county respondents reported that they offer only limited adoption services to reservation Indians. The BIA Social Services Manual states:

> (1) The Bureau of Indian Affairs is not an authorized adoption agency and staff shall not arrange adoption placement.

(2) Indian children who would benefit by adoption shall be referred to the State Public Welfare Department or other authorized adoption agency.

(3) Upon the request of a tribal Court where the tribal Code provides for adoption, the social worker may make a social study of prospective Indian adoptive parents and a child who live within the jurisdiction of the Court, and report his findings to the Court. The reports shall include a recommendation as to the suitability of the adoption when requested by the Court.[25]

About two-thirds of the BIA agency workers stated they were involved in some way in the provision of adoptive services to on-reservation Indian children and/or families. These respondents emphasized that the BIA does not serve as an independent child-placing agency in adoptions, but rather serves as a facilitator for tribal courts by making court-requested recommendations for placement and doing home studies. They also reported frequently being involved in counseling of unwed mothers. All the BIA workers emphasized that they were most often involved in relative adoptions in situations where the child had been living in the relative's home for an extended period of time prior to initiation of adoptive proceedings. In these cases adoptive proceedings were usually initiated by the families through the tribal court with BIA involvement beginning at the court's request after the family had petitioned the court.

Only three BIA agencies supplied caseload data for adoptions. One indicated participation in six on-reservation relative adoptions, and the other in thirteen on-reservation relative adoptions during 1974. The third agency reported it had three children in its active adoptive caseload but had not been able to place them due to lack of resources. One BIA worker reported taking an Indian mother off the reservation to relinquish her child in district court in 1974.

Through a variety of contracts with private adoption agencies, the BIA does play additional roles in the adoption of reservation children. For example, for many years, as noted above, the BIA supported the Indian Adoption Project of the Child Welfare League of America. This project placed several hundred reservation children in non-Indian homes, primarily

on the East Coast and in the Midwest. In 1968, this project was incorporated into the League's Adoption Resources Exchange Network (ARENA) which handles a broad variety of hard-to-place children.

More recently, the BIA has contracted with the Jewish Family and Children's Services of Phoenix to support another Indian adoption project. The project is staffed by an Indian caseworker and its services are available to reservation and off-reservation Indian children and families throughout the state of Arizona. It provides the full spectrum of adoptive services (counseling of unwed parents, recruitment of adoptive homes, home studies, placement planning) and is guided by the goal of casework services congruent with Indian family patterns and practices. For example, the staff person interviewed reported that she attempted to involve the extended family in the counseling of unwed parents as well as in adoptive placements.

Like the BIA, many state and county offices reported limited involvement in adoptions of reservation Indian children. Of the state or county offices which are involved in adoptions, less than half reported that they provide any adoption services to on-reservation Indian children. Of these, only two stated that they would offer the full spectrum of adoptive services to reservation children and parents without qualification or limitation.

Several agencies indicated they were reluctant to become involved because of conflicts with tribes over standards and procedures. Many offices stated they would provide some services, such as counseling of unwed mothers or making home studies ordered by the tribal court, but would not become involved in others, such as recruitment of Indian adoptive homes, petitioning for relinquishment, or actual placement. Some counties stated they could not accept custody of on-reservation Indian children because of jurisdictional issues; others stated they would become involved only if the mother went off the reservation and relinquished her child through the district court system. A small number of county respondents emphasized that their agencies would be willing to become involved if there were requests, but that they had received no requests from reservation families.

The reluctance of many county officials to take an active role in adoptions of Indian children is, in large part, a response to tribal resolutions and expressions against placements with non-Indian families. It was not within the scope of this research to determine whether such placements have

ceased. The fact that many of the county offices included in this project are not placing reservation children with non-Indian adoptive families suggests that the number of adoptions by non-Indian parents has dropped. However, off-reservation or nonagency adoptions were not included in this research effort. Nor did it cover private child welfare agencies, and many respondents suggested that these agencies may be continuing to place Indian children with non-Indian families. Also, during the course of workshops held in Region VIII states, the project staff became aware of wide variations in county and BIA activities in adoptions at different reservations, even within the same state. For example, while no on-reservation adoptions were reported for the last year by BIA or county workers for the Ft. Berthold or Standing Rock reservations in North Dakota, county workers serving another North Dakota reservation reported at a conference that they were currently involved in ten adoptions of tribal children by on-reservation families. Thus, although this study found little evidence of recent adoptions of reservation children by non-Indian families, the picture may be different at reservations not included in the study.

Some states have modified their practices in reaction to Indian disapproval of adoptions by non-Indian families. For example, through its Indian desk, the Washington state child welfare agency has worked out with tribes specific, detailed procedures to be used in seeking adoptive homes for Indian children released for adoption. These procedures include, among other things, a commitment to spend thirty days seeking an adoptive family within the same tribe as the child, and if not successful to spend an additional thirty days seeking a family within a similar tribe. These procedures are now being incorporated into the state child welfare manual. In the past, reservation Indian children who were placed for adoption were usually not registered or enrolled in their tribe and lost all legal ties to it upon adoption off the reservation. A number of state and county respondents mentioned the necessity of enrolling reservation Indian children prior to placement, and two of the eight states studied have written policy statements that Indian children should be enrolled in their tribes prior to adoption so that they will retain the benefits of tribal membership (for example, future judgment payments to tribal members).

Another development is the growing number of formal adoptions within some tribes. While most tribes reported that their courts' codes did not specify procedures and guidelines for adoptions, a number of tribal courts mentioned they were now doing adoptions and felt a need to develop codes to guide their activities.

In the absence of specified court procedures and/or formal termination of parental rights, states have been reluctant to regard tribal court adoptions as valid. Although in other areas, such as foster care and protective services, counties in non-PL 280 states routinely reported accepting tribal court orders, much hesitance to accept tribal court orders with respect to adoptions was expressed. As an example of this, it was reported that tribal court adoptions are not recorded by offices of vital statistics in Montana and South Dakota.

Subsidized adoptions are available in two of the states studied. In each of these states, the BIA has agreed to reimburse the state for adoptions of Indian children by Indian families. These reimbursements are covered by the BIA's group care contracts with the two states. No BIA funds are used to subsidize adoptions of Indian children by non-Indian families. As far as field investigators were able to determine, the subsidized adoption program has not been used extensively for Indian children.

Day Care

On many reservations, it is a well-established practice for relatives and neighbors to care for children in their homes on an informal basis. Recently, however, formal day care service systems have developed on many reservations, and seven of the ten reservations studied presently have one or more on-reservation day care centers.

In most cases, tribes have taken the initiative in developing day care centers. Most of the centers are supported by direct federal funding. Federal funding sources include Headstart, the Office of Education, the Comprehensive Health Program, Comprehensive Employment and Training Act (CETA) funds, and Title IV-A SRS funds. In one case, a day care center received a state start-up grant. Tribal funds were also used by some centers.

Some tribal day care centers are administered under state standards and under state inspection and licensing requirements. In other cases, tribes set their own standards and operate the centers independent of the usual federal-state day care system.

Several states reported that they are not very active in providing day care services on reservations and cited, as a reason, their lack of jurisdiction to license on reservations. However, most of these states were involved

in some manner in day care services on reservations. For example, two states which have not licensed facilities on reservations have signed Title IV-A purchase-of-service day care contracts with tribes. One of the terms of these contracts is that the on-reservation facilities used will conform to state standards.

In North Dakota, through agreements with the BIA, BIA agency social workers are responsible for doing home studies of prospective day care homes and then making recommendations to the state agency through a "standard compliance agreement form." The state agency then "approves" these facilities so that they are eligible for payment through AFDC-related day care monies, and a form of "licensing" is accomplished without the state infringing upon the tribe's jurisdiction.

In another state which does not have jurisdiction on reservations, a tribally-run day care center which had been licensed by the state and used for AFDC children failed to pass a state fire marshall's inspection. The state social services agency refused to relicense the center and withdrew Title IV-A funds but did not force closure of the center.

Most state and county respondents identified licensing difficulties as the major impediment to their involvement in developing formal day care services on reservations. Tribal respondents, however, saw matters in a different light. They were concerned that the state licensing criteria were in some respects inappropriate.

Many county respondents who were not involved in developing or monitoring licensed day care centers or homes on reservations noted they were involved to the extent that day care could be included in computing AFDC budgets for mothers in certain work or training circumstances.

BIA involvement in day care services on reservations is minimal. All BIA respondents stated they did not have responsibility to provide day care services; reasons given were the fact that the BIA manual does not address day care; lack of funds, staff, and facilities; and lack of need, since many tribes have undertaken this area of responsibility themselves. In a small number of cases the BIA did report having assisted tribes in planning and securing funding for day care centers and in working on standards for such programs. Some BIA workers indicated the BIA was also indirectly involved insofar as families might use their general assistance monies in part to pay for day care. In the case of North Dakota, further, the BIA is directly involved

(albeit in varying degrees) in recruiting and recommending day care facilities for state approval.

Several respondents reported that the system for paying for day care services was an impediment to developing these services. In their states, payments for day care were made almost a full month after the end of the month for which the payment was intended, requiring a time lag of almost two months between first date of care and first date of payment. Respondents felt this was an unrealistic method of payment to low-income day care mothers and to tribally-run day care centers whose resources were also limited. Problems in payment were not mentioned by respondents in states where day care was included in the regular AFDC check to the parent or other family member or guardian.

Summary

Patterns of service provision on the ten reservations studied are complicated. There are three major recurrent legal and jurisdictional problems concerning the provision of child welfare services on these reservations: (1) on some reservations and in some states there is disagreement about the roles and responsibilities of state or county offices in providing child welfare services; (2) difficulties exist in licensing facilities on reservations; and (3) some state and county courts and state institutions are reluctant to honor tribal court orders. As a result of these problems, the full range of child welfare services is not available on some reservations.

# CHAPTER 4

# ANALYSIS OF LEGAL AND JURISDICTIONAL PROBLEMS

## Introduction

In 1935, Felix Cohen, who was then Assistant Secretary of the Interior and who later authored a definitive work on Indian law, wrote about the new social security program embodied in the Economic Security Bill: "a fair reading of the Economic Security Bill (H.R. 4120) requires the conclusion that Indians, being citizens of the United States and of the states wherein they reside are included in the benefits of the Act. . . . discrimination against Indians as against other minority groups, is probable in any administration of Federal funds which is placed in the hands of state and local authorities."[26] This view is still held by many SRS officials who have taken an interest in the legal tangle surrounding the status of Indian tribes.

Some states have taken clear positions on this issue. In a recent application for a research and demonstration project (the Navajo Social Services Project), the Arizona Department of Economic Security stated flatly: "Arizona, New Mexico, and Utah make public assistance payments to persons living on the (Navajo) reservation. There are, however, significant differences among the States in the provision of services and in the range of services provided. *Arizona provides no services to reservation residents* [emphasis added]. . . .[27]

In interviews, several state administrators stated that they felt that some limitations on state services to reservation Indians were both appropriate and unavoidable in light of the restricted state authority on reservations and the exemption of Indian lands and income from state and local taxes.

The legal grounds for the reluctance of many states to extend child welfare services on reservations can be illustrated by rulings of the attorneys general of North Dakota and Arizona. A 1959 opinion of the Arizona attorney general stated that the state cannot license welfare institutions or agencies located on Indian reservations and does not have jurisdiction to license a tribal council or the Bureau of Indian Affairs in the event that they engage in child-placing activities. The lack of state jurisdiction for



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licensing child welfare agencies on reservations was reaffirmed in a 1970 opinion of the state attorney general, requested by the commissioner of the Arizona Department of Economic Security (DES), which stated that "the state legislature has not enacted the necessary laws giving the State Welfare Department jurisdiction to license facilities on the reservation. No tribe has indicated they would give the necessary consent to jurisdiction if such laws were enacted."[28]

The 1970 opinion also deals with the authority of the state to include in the AFDC-Foster Home program, reservation children who are placed in foster homes off the reservation.

> Under existing law regarding jurisdiction, ADC-FH payment can only be authorized for reservation Indian children if (1) the reservation Indian child is in fact off the reservation when the act of neglect or abuse occurs, (2) the Superior Court of Arizona has personal jurisdiction and makes an adjudication to that effect, (3) the child is committed to the Department of Public Welfare for placement and services, and (4) the requirements of [Section] 408 of the Social Security act are complied with.[29]

Finally, the opinion considers the question of tribal courts as courts of competent jurisdiction and the effect to be given their orders by state agencies. The opinion states:

> The tribal courts would have the authority to adjudicate a reservation child "dependent, neglected or delinquent." . . . However, the jurisdiction of tribal courts cannot extend beyond the boundaries of the reservation, therefore, *tribal courts cannot place children in licensed facilities off the reservation* [emphasis added].[30]

It states further:

> Tribal courts have no executive arm to commit an Indian child to the Department of Public Welfare. Likewise, the Department of Public Welfare has no statutory authority to accept reservation Indian children from the tribal court or from any other sovereign.
>
> In order for the State of Arizona to provide services in the area of child welfare for families and children of reservation Indians, the state legislature or the people must enact laws to provide for jurisdiction over

> child welfare matters on Indian reservations. Also, the various tribes must accept the state assumption of jurisdiction. Otherwise, the exercise of state jurisdiction in child welfare matters discussed herein would undermine the authority of the tribes over reservation affairs and infringe on the right of the Indians to govern themselves.[31]

In practice there seem to be some circumstances in which the state can serve Indian children, because the Arizona DES has a contract with the BIA under which DES places Indian children in foster homes off the reservation and is reimbursed for services and payments to these foster families by the BIA.

The North Dakota attorney general has issued similar rulings to those in Arizona. North Dakota has a provision in its constitution disclaiming any state rights to lands owned and held by Indians or Indian tribes, as does Arizona.

Before the passage of PL 280, the state supreme court had interpreted this disclaimer as applying to claims involving land title only, thus giving state courts jurisdiction over civil disputes between Indians on reservation lands. In 1963, North Dakota took the steps necessary to extend its civil jurisdiction over Indian country under PL 280, but added the requirement of tribal or individual Indian consent.

An extremely important case in defining the limits of state authority is In re Whiteshield, decided by the North Dakota Supreme Court in 1963. State authorities brought a petition to state court against Indian parents, to terminate parental rights to Indian children for acts occurring on the reservation. The court held that, since the Indian persons involved had not consented to the assumption of state jurisdiction, the state courts could not adjudicate the issue.

In late 1970, when the Devils Lake Sioux Tribe challenged the state foster care program on the Fort Totten Reservation, the Social Services Board of North Dakota requested the state attorney general's opinion on its authority to provide protective services on Indian reservations. The attorney general concluded that the Social Services Board could not enforce licensing functions regarding foster care homes for Indian children on reservations and could not contract with another agency to license foster homes for Indian children on Indian reservations. The state attorney general also ruled that the State Youth Authority could not enforce rules of conduct for an Indian child if it placed him on an Indian reservation, could not change a placement from the reservation, and could not remove a child from the reservation.

Several Indian respondents objected that the result of these and other similar rulings has been the discriminatory withdrawal of state services for reservation Indians. Other Indians have expressed the view that the withdrawal of state services is, on balance, no misfortune since state and county workers were making excessive placements of Indian children off the reservation. It is perhaps noteworthy that no Indian tribe or individual in any state has taken legal action to force a state to provide child welfare services, and apparently no tribes have formally complained to SRS.

The remainder of this chapter discusses in detail the legal and jurisdictional limits on state child welfare activities on reservations.

## SRS Legislation and Child Welfare Services on Reservations

The Social Security Act. The specific statutory authority for the SRS child welfare programs is principally Titles IV and XX of the Social Security Act. Title IV is subdivided into parts A through D. The Title IV-A programs provide aid to families with dependent children (AFDC), which consists of financial assistance to these families (including foster families). Generally, AFDC is available only to low-income people who meet eligibility standards. In contrast, Title IV-B programs provide child welfare services to persons regardless of their income and resources, although low-income persons are given priority. Title IV-C establishes the authority for work incentive programs (WIN) for AFDC recipients, and is therefore tied into the Title IV-A program. Title IV-D concerns state efforts to establish the paternity of AFDC children. Title XX provides for federal support of social services. This new title replaces the service programs previously authorized for children under Title IV-A and for certain adults under other titles of the Social Security Act.

For each major program, the federal government provides financial assistance to states that agree to participate by appropriating state matching funds and by submitting state plans which conform to federal statutory requirements. The amount of federal assistance available to the states varies considerably from program to program. For the Title IV-B Child Welfare Services program, in which income is not a factor in eligibility determination, Congress authorized $246 million and appropriated only $50 million for FY 1975. The federal grant limit for Title XX services is $2.5 billion. Therefore a considerably larger amount of federal financial assistance is available to the state for social services for low-income persons under Title XX than under Title IV-B.

One important aspect of these programs is that those states which elect to participate in them by submitting state plans must comply with federal program requirements established by statute and regulations. In numerous cases, such as King v. Smith, Townsend v. Swank, and Carleson v. Remillard, the courts have held that a state may not exclude from AFDC benefits a class of potential recipients who are eligible under federal AFDC standards. Such authorized state exclusion violates the Social Security Act and is invalid under the federal supremacy clause of the United States Constitution. However, the states do have considerable latitude in establishing financial eligibility standards for their programs.

A state's failure to provide the same services to residents of Indian reservations as to other persons in the state raises the question of whether such state action conflicts with federal statutes or is unconstitutional. To answer this question, the following discussion considers the "statewideness" provisions of Title IV and XX, general equal protection principles, and specific case law concerning the eligibility of reservation Indian persons for Social Security programs.

Statewideness. The "statewideness" requirement for Title IV-A provides that "a state plan . . . must . . . be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them."[32]

The regulations further provide that the statewide operation of the state plan shall be accomplished through a "system of local offices." The apparent purpose of these regulations is that each state's Title IV-A program be administered uniformly, so that the same level of assistance is available throughout the state.

In contrast, the Title IV-B statewideness requirement permits internal geographic variations within each state in the provision of services. The specific statutory language authorizes financial assistance to each state

> that makes a satisfactory showing that the state is extending the provision of child-welfare services in the State, with the priority being given to communities with the greatest need for such services after giving consideration to their relative financial need, and with a view to making available by July 1, 1975, in all political subdivisions of the State, for all children in need thereof, child-welfare services. . . .[33]

This differs in two significant ways from the Title IV-A statewideness requirement. First, until 1 July 1975, the participating states were not required under Title IV-B to have child welfare programs with statewide scope, merely to satisfactorily show that they are extending these programs in this direction. Second, a state may give priority to communities with the greatest need for these services "after giving consideration to their relative financial need."[34]

The statewideness requirement in Title XX is much less strict than the IV-A requirements, which it supersedes. Title XX requires that family planning services be provided statewide, and that at least one social service be provided in each part of the state for each of the five goals of the title. States are free to divide themselves into districts and to provide different types or combinations of services in different districts. (Since Title XX is quite new, it is not yet clear whether these provisions will be challenged, perhaps on equal protection grounds, or whether they would survive such a challenge.) Under Title XX, states could design their plans so as to place Indian reservations in separate districts and provide only minimal services in these areas. However, this would require limiting services to non-Indian as well as Indian residents of reservations.

Equal Protection. Under traditional equal protection principles, a state has the right to make classifications as long as those classifications meet what is called "the reasonable basis test." This test applies when classifications are in the area of economic activities and social welfare. As the U.S. Supreme Court stated in the case of Dandridge v. Williams:

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[35]

However, when the classification in question is based on nationality or race, it is called an "inherently suspect" classification and it is more difficult to justify. The test applied is the "strict scrutiny" test; the only way a state can pass it is to show that the classification is necessary to the accomplishment of a compelling state interest.

Thus, in the area of economics and social welfare, a state has "considerable latitude in allocating . . . AFDC resources, since each state is free to set its own standards of need and to

determine the level of benefits by the amount of funds it devotes to the program."[36] However, when a state's classification creates more than one class of needy persons, and the classes are sharply divided racially, the classification is "inherently suspect." This standard would apply whether or not the classification specifically mentioned "Indians" as a class. If the state were to provide services to non-Indian residents of reservations but not to Indians, this practice would be even more suspect. The question then would be whether the state's arguments, such as "Indians do not pay state taxes" or "We cannot license foster homes on reservations" represent a "compelling state interest." Both arguments are discussed later in this chapter.

In addition, a classification such as that outlined above would very likely violate Section 601 of Title VI of the Civil Rights Act of 1964, which reads:

> No person in the United States shall on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[37]

Cases Concerning Indians. The question of whether Indians are entitled to social security welfare benefits equally with other citizens of a state has been addressed in several legal opinions, statutes, and cases. Although on two separate occasions state welfare institutions attempted through litigation to avoid responsibility for making such payments, in each instance they were unsuccessful. The weight of legal authority is on the side of the equal entitlement of Indians to benefits; and no statutory or case law appears to the contrary.

The issue first appeared in litigation in 1938 in State ex rel Williams v. Kemp. The question was whether the state of Montana or the counties in the state were responsible for the payment of welfare benefits to reservation Indians. The Supreme Court of Montana was requested to interpret a state statute which required that the state general fund reimburse the counties for social security assistance to reservation Indians. In the process of rendering its opinion that the state general fund was responsible, the court discussed Indians' entitlement to social security benefits as citizens:

> The broad language of the federal Social Security Act on its face made the grants to the states contingent upon the fact that no citizenship requirement should exclude any citizen of the United States from relief benefits. Indians are citizens of the United States.

> The Montana Legislature, confronted with the question of choosing to accept or reject federal grants, chose to accept them. To do this, it was obliged to meet the conditions imposed.[38]

State ex rel Williams v. Kemp is often cited to support the proposition that Indian persons are entitled to social security benefits.

The issue was not raised again for sixteen years. In 1954, at the height of termination philosophy, Arizona and San Diego County in California became actively involved in attempts to limit state and county liability for Indian welfare payments. Arizona excluded reservation Indian residents from its state plan by an enactment of the state legislature which stated that "no assistance shall be payable under such plan to any person of Indian blood while living on a federal Indian reservation."[39] Arizona then submitted a plan under Title XIV of the federal Social Security Act for aid to the permanently and totally disabled, which excluded Indians. DHEW's predecessor, the Federal Security Agency (FSA), refused to approve the plan on the grounds that the plan was racially discriminatory and that it imposed as a condition of eligibility a residence requirement prohibited by the Social Security Act.

Arizona thereupon brought suit declaring that its plan did meet FSA requirements, and seeking to compel the administrator to approve it. In Arizona v. Hewing, the court rejected the theory that the state program was racially discriminatory but it found that the exclusion of Indians by Arizona was arbitrary, despite Arizona's argument that the federal government had the ability to support Indians directly, presumably through the BIA. Arizona appealed this ruling to the circuit court but its suit was dismissed on jurisdictional grounds in Arizona v. Hobby. Arizona v. Hobby is sometimes cited as legal authority that a state may not discriminate against Indians in the delivery of social security benefits but it is not a valid precedent since the case was dismissed entirely on jurisdictional rather than substantive grounds. On the other hand, Arizona v. Hobby does represent an important historical episode and is the farthest any state has attempted to take the legal argument.

Acosta v. San Diego County is the only other directly relevant case. San Diego County attempted to deny welfare benefits to reservation Indians on the grounds that they were not residents of the county for the purpose of obtaining direct county relief. On appeal the court found that reservation Indians were entitled to relief on the constitutional basis of the Fourteenth Amendment right to equal protection. The opinion reads in part:

> The argument that responsibility for reservation Indians rests exclusively on the federal government has been rejected. . . . That reservation Indians are entitled to direct relief from either the state or county in which they reside was conceded in State ex rel Williams v. Kemp. . . . The only issue there was which political body should bear the expense.
>
> From the conclusion reached that Indians living on reservations in California are citizens and residents of this state, it must therefore follow that under Section 1, Amendment XIV of the Constitution of the United States they are endowed with the rights, privileges and immunities equal to those enjoyed by all other citizens and residents of the state.[40]

The issue of equal entitlement of Indian persons to social security benefits has never been directly addressed by the U.S. Supreme Court. Nevertheless the court in the recent case of Ruiz v. Morton, which had nothing to do with DHEW law but rather with BIA responsibilities, stated in dictum its view that social security benefits could not be denied to an Indian person, whether that person lives on a reservation or elsewhere. It said, "Any Indian, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which this state participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation."[41]

The Taxation Argument. As a practical matter, it is often argued that states and counties cannot afford to provide full services on Indian reservations because Indian lands and income earned by Indians on the reservation are exempt from state and local taxation. This argument cannot succeed on legal grounds. There is a constitutional prohibition against tying welfare benefits or services to the contribution of individuals to state taxes. The classic case for this proposition is Shapiro v. Thompson. The states of Connecticut and Pennsylvania and the District of Columbia attempted to justify a one-year residency requirement on several grounds, including the fact that new residents, as opposed to old residents, had not contributed to the community through the payment of state taxes and therefore should not be entitled to AFDC benefits, which are partly state financed. The court summarily dismissed this rationale as an invidious classification and a violation of the equal protection clause.

> Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens.

> The Equal Protection Clause prohibits such an apportionment of state services.
>
> We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.[42]

Although states could not legally deny services to reservation Indian persons on the basis of the taxation argument, there have been many attempts to use this argument to persuade Congress to increase the federal matching share for public assistance to Indian persons living on reservations. The Social Security Act, as originally enacted in 1935, contained no provisions specifically related to Indian people. However, the Senate approved an amendment which would have established a special pension program for blind, crippled, and needy aged persons. This proposal was deleted from the bill in conference committee.

Two years after the Act was passed, there began a long and remarkably consistent series of congressional bills to increase the federal matching share for state plans for public assistance to Indians living on reservations. The first of these bills, S. 1260, was introduced in 1937 and directed the Social Security Board to furnish to "Indian wards of the United States" all benefits authorized by the Social Security Act to be provided under approved state plans, and authorized the necessary appropriations. In other words, it would have transferred the administrative and financial responsibility for these programs to the federal government. This bill was never reported out of committee. An interesting feature of this bill is that it was sponsored by twenty-three senators, including almost all of the senators from states with substantial reservation Indian populations.

A bill (S. 3802) introduced in 1938 by Senator Nye of North Dakota would have authorized an additional grant for aid to dependent Indian children; it also died in committee. The next year saw the introduction of two new bills by Senator Hayden and Representative Murdock, both of Arizona. Senator Hayden's bill, S. 17, would have added a new title to the Social Security Act to provide grants to states for old-age

assistance, aid to dependent children, and aid to blind programs for Indian persons living on trust land. Representative Murdock's bill, H. R. 920, would have mandated aid to Indian persons under these programs, with the federal government paying the full amount of these assistance payments to Indian persons, plus 10 percent administrative costs. Neither of these bills was reported out of committee.

While Senator Hayden was unable to get committee approval of his bill in 1939, he did bring the subject before the Senate through an amendment to another bill. This amendment would have required federal reimbursement for state expenditures for aid to on-reservation Indian persons under the aid to dependent children, aid to the aged, and aid to the blind programs, if the state plan for such programs "includes Indians upon the same conditions as other persons covered by such plan."[43] In addition, this amendment would have specifically authorized the Office of Indian Affairs (predecessor to the BIA) to "enter into arrangements" for the Office of Indian Affairs to administer any part of such state plan with respect to Indians.

Senator Hayden also offered, as an alternative, a proposal which would have prohibited federal disapproval of a state plan "because such plan does not apply to or include Indians" living on a reservation.[44] This second proposal, which would have authorized a state's refusal to provide assistance to on-reservation Indians, passed the Senate. However, as with the 1935 Indian pension amendment, this Senate-added amendment was deleted from the final bill by the conference committee.

In 1949 (81st Congress, 1st Session), bills introduced in both the House and Senate would have provided federal aid equal to 80 percent of the total spent under a state plan. These bills failed to reach the floor.

In 1950, there was a successful effort to increase federal financial participation in financial assistance programs on the Navajo and Hopi reservations, which lie within Arizona, New Mexico, and Utah. The Navajo-Hopi Rehabilitation Act provides that the federal government will reimburse these states for 80 percent of the normal state share of the costs of financial assistance programs (AFDC and assistance for the disabled, blind, and elderly). Thus when the usual federal share is 75 percent, the net federal contribution for cases on these reservations is 95 percent (75 percent plus 80 percent times 25 percent). One reason for the passage of this act when similar bills had failed is that it was attached to a popular bill to promote the rehabilitation of the Navajo and Hopi tribes, whose members were suffering from a severe and well-publicized draught.

The events leading up to the inclusion of a section on welfare programs in the Navajo-Hopi Rehabilitation Act are most interesting. Prior to the passage of the act, the states of Arizona and New Mexico had refused to include reservation Indians in public assistance programs under the Social Security Act. In April 1949, representatives of the two states met with BIA officials and with representatives of the predecessor agency to DHEW to discuss this situation. No tribal representatives were present. From this meeting came the "Santa Fe Agreement," which established the formula described above.

The Santa Fe Agreement was added to the Navajo-Hopi Rehabilitation Act at the last moment. The first version of the legislation was vetoed by President Truman, who objected to a section which would have transferred to the states legal jurisdiction over tribal lands. After the veto, Congress rewrote the bill, dropping the objectionable section and adding a new section which incorporated the Santa Fe Agreement.

During the debate in the House on adding the Santa Fe Agreement to the bill, Representative Morris of Oklahoma gave three reasons for making special provisions for the affected states. First, they "are very sparsely settled compared with most of the other States of the union"; second, "they have a much heavier impact of Indian population upon them than the others do," and consequently, "those people in the States affected cannot possibly carry on with the same kind of social-security program as to Indians that the rest of us carry on with in the usual circumstances"; and third, "in Arizona out of 72,691,200 acres of land the Government owns 50,471,920 acres or 69.43 percent. The State, of course, received no tax revenue whatsoever from the land owned by the Federal Government."[45] Since the inclusion of the Santa Fe Agreement in the Navajo-Hopi Rehabilitation Act, there have been a number of attempts to enact similar legislation for other programs and other states. Between 1956 and 1970, seventeen such bills died in committee.[46] In 1970 and 1972 the Senate included, in amendments to the Social Security Act, provisions for 100 percent federal funding for assistance, not services, to Indians, including urban Indians and other native people not living on a reservation. In both years, these provisions were dropped by the conference committee. Senator Metcalf of Montana introduced the 1970 amendment. Some of his arguments for the amendment were financial: land held by the United States in trust for Indians is exempt from state and county property taxes, and state income taxes paid by Indians are meager as a result of their poverty. Senator Metcalf also maintained that the "American Indian is a Federal responsibility,"[47] which extends even to urban Indians because many of these people moved from their reservations to urban centers as a direct result of a federal relocation program.

Senator Stevens of Alaska, presenting Metcalf's amendment in slightly different form in 1972, made essentially the same arguments. The only additional point was that the National Governors' Conference stated in its 1972 policy positions that "the federal government should administer the Social Security Act programs on the federal Indian reservations, or if the states are to discharge this function, the federal government should first grant adequate jurisdictional authority to the States thereby enabling them to properly discharge this function."[48]

The pattern that emerges from this compilation of proposed legislation is a long series of attempts by congressmen from states with relatively large Indian populations to have the federal government pay a greater share of the costs of programs for reservation Indians under the Social Security Act.

On the state level, there are several examples of aiding counties which include Indian reservations. Montana, North Dakota, and Minnesota have all adopted legislation which increases the usual state share and reduces the usual county share of certain welfare expenses for those counties which overlap with reservations.

Summary. The legal arguments summarized above make a strong case that as far as the Social Security Act and associated case law are concerned, states must provide the same services to Indians as to non-Indians. Under Title XX, states could design their plans so as to provide different services on reservations, but within the reservation boundaries the state could not differentiate between Indians and non-Indians. Under Title IV-B, states must now provide the same services on reservations as in other equally needy parts of the state.

The matter does not rest here, for the questions of BIA responsibilities and of whether the activities of state or county social workers infringe on tribal powers of self-government and the problems of licensing and acceptance of tribal court orders must also be explored.

## BIA Responsibilities for Social Services

The statutory authority for BIA programs, including social service and general assistance programs, is the Snyder Act, passed in 1921. The act reads, in part:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and for the following purposes:

> General support and civilization, including education.
>
> For relief of distress and conservation of health. . . . And for general and incidental expenses in connection with the administration of Indian affairs.[49]

The language of the Snyder Act is extremely broad, especially in comparison with the great complexity and specificity of the Social Security Act. It therefore provides the authority for a range of programs and services, with the details presumably to be established in more specific legislation and in regulations.

The regulations for the social welfare program administered directly by the BIA are not located in the Code of Federal Regulations. Instead, they are distributed as part of the Indian Affairs Manual, a loose-leaf collection of materials that is generally not available in public libraries or in law libraries.

The BIA social services program consists of three major components: financial assistance, child welfare services, and social services. The budget for these components is summarized in table 2. Financial assistance in the form of the BIA general assistance program accounts for over two-thirds of the social services budget. General assistance monies are available to needy Indians who are not currently receiving financial assistance through non-BIA public assistance programs, such as AFDC and Supplemental Security Income (SSI). The general assistance program includes the Tribal Work Experience Program (TWEP), which provides work experience to employable general assistance recipients.

The budget item entitled "social services" is primarily accounted for by the employment of BIA social workers in the agency, area, and central offices, or for contracts with tribes which have taken over the functions of BIA agency social work employees. The "child welfare" item designates funds available for the purchase of services.

The BIA manual and budget justifications presented to Congress state that BIA social services and child welfare services are provided on a residual basis. The manual states:

> A program of social services and assistance for Indian children shall be provided, as required, by the Bureau of Indian Affairs within the limits of available resources, only after determination of what part, if any, of the necessary services or assistance is available through other resources. . . .[50]

TABLE 2

BIA SOCIAL SERVICES BUDGET

| | FY 1974 actual | FY 1975 estimate | FY 1976 request |
|---|---|---|---|
| 1. General Assistance . . | $45,389,217 | $49,095,000 | $49,573,000 |
| (caseload) . . . . . | (61,424) | (65,000) | (68,000) |
| 2. Other Welfare Assistance: | | | |
| (a) Child Welfare . | 6,922,760 | 6,480,000 | 7,776,000 |
| (caseload) . . | (3,007) | (3,100) | (3,200) |
| (b) Miscellaneous Assistance. . | 412,401 | 400,000 | 840,000 |
| (burials) . . | | (250) | (1,200) |
| 3. Social Services. . . . | 7,356,482 | 7,988,000 | 8,000,000 |
| Total. . . . . | $60,080,860 | $63,963,000 | $66,189,000 |

SOURCE: Department of the Interior, Bureau of Indian Affairs, "Operation of Indian Programs," in U.S., Congress, House of Representatives, Committee on Appropriations, Subcommittee on the Department of the Interior and Related Agencies, Hearings, Department of the Interior and Related Agencies Appropriations for 1976, Part 3, 94th Congress, 1st Session, 17 March 1975, p. 71.

The justification for the FY 1976 budget stated:

> The program undertakes to provide the necessary assistance and social services for Indians on reservations and in the jurisdictions referred to above [Alaska and Oklahoma] only when such assistance and services are not available through State or local public welfare agencies.[51]

These statements raise the question of how BIA officials are to determine what needed services are not "available" through state or local offices. In the justification for the FY 1964 budget, the BIA did provide the following clarification:

> In certain states, the courts have asserted lack of civil jurisdiction on reservations, and this has hindered seriously the ability of state agencies to provide protective services for Indian children which are based upon state court actions. The Bureau, therefore, must find ways and means of filling the gap.[52]

Further guidance as to BIA policies on this point is provided by testimony before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations in 1969 and 1973. (The point has not been raised in other appropriations hearings during recent years.) In 1969, Rep. Julia Hansen was involved in the following exchange with William R. Carmack, Assistant Commissioner of Community Services:

> MR. CARMACK: If the states don't extend welfare to Indian communities, we extend it.
>
> MRS. HANSEN: Place in the record the States that extend welfare assistance to Indians. How many are there?
>
> MR. CARMACK: There are about 13 where we extend welfare assistance. There are a few States who provide assistance to Indians and we can list them. But in no case would we be duplicating a State service.
>
> MRS. HANSEN: I think it is well to list these States for the record.
>
> MR. CARMACK: There are only eight States. The States that treat Indians the same as everyone else. They are the ones who--Washington State, Oregon, California, Kansas, Utah, Wisconsin, Michigan, and Minnesota, excepting the Red Lake Reservation. Those States--
>
> MRS. HANSEN: Are the only ones--

MR. CARMACK: They are the only ones. All of the other States in the country with Indian reservations do not extend these services to Indians.

MRS. HANSEN: To me this is appalling. Here is part of the BIA budget for welfare that should be in the total welfare budget. Isn't that correct?

MR. CARMACK: If that is to be the policy.

MRS. HANSEN: Let's face it, if the States of Washington, California, and Oregon, for instance, can treat Indians as people, will you tell me why other States cannot?

MR. CARMACK: I can't speak for the States, but I can tell you what a welfare director in one of the other States would say, I believe.

MRS. HANSEN: Such as?

MR. CARMACK: I believe he would say that if the Indians are in significant numbers on tax exempt land, not contributing to the State's pool of revenue from which it is able to expend welfare funds, then it is an unjust hardship on the State to have to cover that portion.

MRS. HANSEN: Our State does not feel that way. Our State feels they are making their contributions as citizens because the Indians have the same rights as anyone.[53]

In 1973, Mrs. Hansen got into a similar exchange with BIA official Raymond Butler, in which he remarked:

> In some States there are large acreages of trust status land--I draw particular attention to the State of South Dakota where, on Pine Ridge and Rosebud you have complete counties who have a very, very small taxable base upon which to support such a community services program as a welfare program.[54]

Testimony in both cases appears directed primarily toward financial assistance programs.

This evidence suggests the difficult position in which the BIA is placed. BIA officials assert that the tax argument partially explains the nonavailability of SRS assistance and perhaps services to reservation Indians. Although this argument may be legally faulty, as argued above, the BIA recognizes the resulting nonavailability and steps forward to supply needed

assistance and services with BIA resources. It could be argued that the BIA thereby contributes to the nonprovision of services by states. Usually BIA general assistance fulfills a greater percentage of need than state financial assistance, and thus to press the point in terms of general assistance might be a real disservice to those Indians affected.

## Activities of State or County Social Workers on Indian Reservations

A possible area of jurisdictional conflict is the role of state and county social workers who are providing services to Indians on reservations. Although this issue does not appear to have surfaced in DHEW proceedings or in court cases, some state and county social workers are reluctant to act in the face of legal or jurisdictional uncertainties. Tribes retain substantial powers of self-government, particularly in states not subject to PL 280. The limits of state powers on reservations are indicated by the test of Williams v. Lee; a state action is invalid if it "infringe(s) on the right of reservation Indians to make their own laws and be ruled by them."[55] The question, then, is whether activities of child welfare workers constitute such an infringement.

As a preface, it should be noted that tribal powers of self-government include the power to exclude nonmembers from the reservation. The power of the tribal government to exclude persons is, however, limited by the due process requirement of the Indian Civil Rights Act, so that the decision to exclude a person must be based on a reason that is rationally related to a legitimate governmental interest.

Assuming that the tribe does not attempt to exercise the power to exclude, it appears that most social services may not constitute an exercise of jurisdiction. Most social service activities do not involve the use of governmental enforcement powers but rather the voluntary provision of services such as counseling, information and referral, and the gathering of information.

However, the answer is not so simple in the case of protective services, foster care, and adoptive services. Each of these services usually involves dealings with courts or with the police as well as licensing. Protective services are offered not on a voluntary, but rather on a mandatory basis. If the state does not exercise jurisdiction over reservations under PL 280, jurisdictional conflicts may arise in the provision of many child welfare services.

The voluntary acceptance of state- or county-provided services by an on-reservation Indian recipient does not raise jurisdictional

issues. Most of a social worker's activities are cooperative in nature. Even where a person refuses to allow a social worker access to his or her home, as may occur for a home study of the natural parents for a petition to involuntarily terminate their parental rights, the state or county welfare department can apply to the tribal court for an order requiring such access, in which case tribal, not state, authority would govern.

Jurisdictional conflict would arise if a state or county welfare department were to be granted custody of an Indian child by a tribal court. The state or county would then have the power to make fundamental decisions about the case, treatment, and future of that child, including the possibility of placing the child in an off-reservation foster care or adoptive home. This would mean a transfer in "jurisdiction" (using this term broadly) from the tribe to the state or county. In the case of Black Wolf v. District Court, a tribal court's transfer of jurisdiction over an on-reservation Indian child to a state court in order to facilitate placement in an off-reservation institution was held to be void since it was viewed as an assumption by the state of jurisdiction over Indian persons on the reservation without following the formalities of PL 280. A similar challenge would be made of a transfer of custody to a state or county agency.

Such challenges could be avoided by the tribal court's retention of jurisdiction over that case. The tribal court can order the child placed in supervision of the state or county welfare agency, transferring custody to the state or county on the condition that the child not be removed from the reservation. This way, the tribal government's powers would not be diminished.

In short, in states which are not under PL 280, county social workers can recognize tribal sovereignty over tribal members by dealing with the tribal court and by respecting tribal laws and ordinances. Field research showed that county social workers were cooperating with the tribal courts and respecting tribal ordinances. Difficulties may still arise, however, over questions of licensing and acceptance of tribal court orders by state courts.

## Licensing of Foster Care and Day Care Facilities

Some states have taken the position that since they lack jurisdiction on Indian reservations, they cannot license child care facilities on reservations. As noted above, state attorneys general of Arizona and North Dakota have written opinions with this conclusion.

Titles IV-A and IV-B provide that federal financial participation is available for foster care, group care, and day care only if the child care home or facility is "licensed by the State in which it is situated or approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing."[56] Title XX does not mention state "licensing or approval," but instead requires that there be "a State authority or authorities . . . responsible for establishing and maintaining standards."[57]

If a state cannot license child care facilities on reservations or find some acceptable substitute to licensing, no federal funds can flow to on-reservation child care programs. The practical results are that it is difficult to develop foster family homes, day care centers, and group care facilities on reservations, and many reservations lack these needed services.

Courts have ruled that tribal self-government includes the power to license and impose license taxes on non-Indians engaged in business on the reservation.[58] (The Social Security Act does not allow for tribally-licensed facilities, and, to the best of the research team's knowledge, no tribe has chosen to license child care facilities.)

There have been no court decisions that support or contradict state attorney general opinions that states cannot license child care facilities on reservations. The barrier to state licensing on reservations is that certain aspects of licensing may infringe on tribal self-government and thus represent an invalid extension of state jurisdiction onto the reservation.

The state's authority to license child welfare facilities derives from specific state statutes, which are supported by the state's "police power." This concept encompasses government activities to protect the public safety, health, and welfare. Statutory provisions concerning licensing generally designate agencies responsible for administering licensing programs and may include civil and/or criminal penalties for operation without a valid license.

In this discussion, perhaps the most important aspect of licensing is the state's enforcement power. If an off-reservation licensee does not meet established standards, the state can revoke the license. If the licensee then continues to operate without a valid license, the state has the power to invoke sanctions. There is a broad range of penalties; criminal penalties, civil penalties, (which are essentially a different variety of fines), and withholding of governmental financial assistance are the most common.

It is clear that state imposition of civil or criminal penalties for events occurring on the reservation would be an exercise of

state jurisdiction, especially if the applicant or licensee were an Indian person. If the state limits its sanctions to the withholding of funds (which is all that the Social Security Act requires), there may not be any invalid exercise of state jurisdiction on the reservation. However, if a state limited its sanctions for on-reservation facilities to the withholding of funds and imposed a broader range of sanctions off the reservation, this might violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

One solution to this confusion of jurisdictional problems is the "Affidavit of Standard Compliance in Lieu of License" now in use in North Dakota. This approach essentially consists of BIA or tribal inspection of a foster care, group care, or a day care facility, certification by the inspecting agency that this facility complies with the state licensing standards or the Federal Interagency Day Care Requirements, and formal approval of the facility by the state agency. The legal authority for this approach is an interpretation of the requirements in the Social Security Act that a facility must be "licensed or approved" by the state. The term "approved" was interpreted to support this approach, in which state approval is actually only a formal requirement after the actual inspection, and determination of whether the facility meets standards has been performed by or placed in the hands of other agencies. This interpretation might seem open to challenge as being a delegation, by the state agency, of its authority for exercising administrative discretion in the administration or supervision of the state plan. However, this procedure has been approved by SRS.

Some states (including some states not under PL 280) have chosen to license child care facilities on reservations without raising the issue of whether they have authority to do so. In two cases encountered in the field research where states contracted with tribes to run on-reservation day care centers with Title IV-A funds, the problem of licensing was dealt with by including in the purchase-of-service contract a provision that the day care center would meet state licensing requirements.

The alternative to the legal uncertainties raised by these patchwork solutions and the state "approval" approach is federal legislation to clarify licensing authority for child care facilities on reservations. Congress could explicitly enable states to license these facilities, or could amend the Social Security Act to state that federal financial participation would be available for care in on-reservation facilities licensed by tribal governments.

A second problem in the field of licensing is the question of standards. As noted in chapter 3 (pp. 27-34), many state, county,

and tribal officials reported that current state licensing standards, especially physical standards, are inappropriate and unnecessarily restrictive for reservations and make it difficult to develop Indian foster care homes and other child care facilities on reservations. One state reported that it had raised the question of writing modified standards for reservations but that SRS officials advised that this would not be permissible.

A recent SRS Program Instruction, issued 30 December 1974, explicitly endorsed dual standards for Indian reservations, but no such standards have yet been implemented. The Program Instruction is discussed in detail in chapter 5, (pp. 72-78).

State Recognition and Enforcement of Tribal Court Orders

Another area of legal and jurisdictional problems is the recognition and enforcement of tribal court orders by state courts and agencies. As explained in chapter 2, many Indian tribes have established their own tribal courts. Unless the reservation is subject to PL 280, tribal courts have jurisdiction over all matters not taken over by the federal government. The federal government has jurisdiction over offenses included in the Major Crimes Act of 1885. Otherwise, tribal courts have criminal jurisdiction over offenses committed by Indians on reservations. Similarly, tribal courts have civil jurisdiction over cases which involve Indian litigants and events or transactions that occurred on the reservation.

The enforcement powers associated with a tribal court are limited to a geographic area within which the tribe carries out its governmental activities. The tribal police can arrest an offender or enforce a tribal court order on the reservation, but generally are without power to do so outside the reservation boundaries. In this respect, tribal courts are similar to state courts, since a sheriff or policeman of one state cannot exercise his customary powers in another state. A court can have its orders enforced outside the geographic limits of its jurisdiction only if another court or agency, having jurisdiction or authority to act, recognizes and enforces the first court's orders.

The recognition by the state of tribal court orders is important in a variety of circumstances. For example, federal regulations governing AFDC foster care payments require that placements be made through the appropriate court. SRS has stated, most recently in a Program Instruction of 30 December 1974, that county social workers should work through tribal courts and recognize tribal court orders as satisfying this regulation in cases of reservation Indian children. The field research done for this study confirmed that county social workers were complying with this Program Instruction.

However, problems have arisen in other circumstances, such as involuntary commitments by tribal courts to state institutions, the supervision of a foster care placement by a tribal court when foster parents leave the reservation, and the recognition by the state of adoptions through tribal courts. There have been occasions when tribal courts have been unable to commit delinquent children to any institution because the only available institutions were state institutions which would not enforce involuntary commitments by tribal courts. Indian adoptive parents and children have had difficulties because some state departments of vital statistics do not record adoptions made through tribal courts. When foster parents move off the reservation with a foster child, tribal courts have had difficulty in continuing to supervise foster care placements.

These kinds of problems are much less likely to arise between states, because state courts are required, by the U.S. Constitution (Article IV, Section 1), to extend "full faith and credit" to the "public acts, records, and judicial proceedings of every other state."

Various objections have been made to extending the principle of full faith and credit to the recognition and enforcement of tribal court orders. Four commonly raised objections are that many courts may not adequately observe due process, are not "courts of record," are unduly affected by tribal politics, and have judges who are not trained as lawyers. None of these arguments provides a solid legal basis for flatly refusing to accept tribal court orders.

For example, the Indian Civil Rights Act of 1968 requires that tribal courts observe a type of due process. This legislation fails to state whether the due process requirements formulated in federal court decisions apply across the board to tribal courts, or whether there is a different "Indian due process" based, at least in part, on tribal traditions. This has not yet been resolved by the courts. Most courts that have spoken to this issue have stated that the usual due process guarantees may be modified where they conflict with tribal governmental or cultural interests.

Under the doctrine of full faith and credit, a judgment in another jurisdiction is entitled to judicial recognition and enforcement if there has been a reasonable method of notification and a reasonable opportunity to be heard for the parties affected by that judgment. There is no requirement that specific due process procedures have to be followed. Thus, an Indian tribal court judgment or order which meets basic requirements of notice, impartiality, and opportunity to litigate the issues would meet the general due process requirements for recognition and enforcement

in a state court. As a practical matter, however, a tribal court which follows procedures closely resembling those of state courts will more likely be granted effect by state courts.

Several federal and state court cases dealt with the recognition of tribal court orders by state courts. In 1855, the U.S. Supreme Court dealt indirectly with this issue in United States, Use of Mackey v. Cox. The case concerned the settlement of an estate and turned on the question of whether administrators appointed by the Cherokee Nation had the authority to act on behalf of the estate in the District of Columbia. The court noted that, by statute, a state or territory could appoint an administrator with this authority; the court then ruled that the Cherokee Nation "may be considered a territory of the United States"[60] within the meaning of this statute.

Other federal courts and several state courts have since addressed the question more directly and have generally ruled that tribal court orders must be recognized and enforced by state courts. In 1893, the U.S. 8th Circuit Court ruled, in Mehlin v. Ice,

> the proceedings and judgments of the Cherokee Nation in cases within their jurisdiction are on the same footing with proceedings and judgments of the territories of the Union, and are entitled to the same faith and credit.[61]

Two subsequent cases illustrate that procedural irregularities in the tribal courts do not preclude the recognition and enforcement of their orders in other courts. In Cornells v. Shannon, the court stated that "mere irregularities or errors" in tribal court proceedings would not prevent it from recognizing tribal court orders.

In Barbee v. Shannon, a territorial court held that a tribal court order was not entitled to full faith and credit because the tribal court order failed to state whether it was the result of a hearing or even what type of proceeding was involved. The territorial court upheld a second tribal court judgment which met these basic requirements for recognition. The Cornells and Barbee cases illustrate that even informal proceedings can be recognized, if tribal court records meet certain minimal information requirements.

In the last twenty-five years, two state supreme court cases, both involving the Navajo Nation, have raised the issues of full faith and credit or of comity as applied to tribal court judgments. The first of these, Begay v. Miller, concerned a state divorce decree, ordering alimony and child support payments, and an

earlier tribal divorce decree, which did not. The Arizona Supreme Court held that the state court was without jurisdiction to hear a divorce matter that had already been decided in tribal court. The court refused to classify the theory for its decision as full faith and credit, since the Constitution only refers to states. Instead, it recognized the tribal court decree "because of the general rule, call it by whatever name you will, that a divorce valid by the law where it is granted is recognized as valid everywhere."[62]

In a more recent case, Jim v. CIT Financial Services Corp., the New Mexico Supreme Court held that a Navajo statute be granted full faith and credit. This court reasoned that the federal statute which implemented the full faith and credit clause provided for recognition of the statutes of territories of the United States, and that the Navajo Nation is a "territory" within the meaning of that statute, citing the Mackey case.

In summary, several court decisions support the position that tribal courts' orders are entitled to full faith and credit, but the U. S. Supreme Court has not given a definitive ruling. Mackey does not deal squarely with this point.

In the absence of a definitive court ruling or federal legislation on this matter, each state must decide the issue in its courts or by state legislation. State attorneys' general opinions in Colorado and Utah are reported to conclude that tribal court orders are entitled to full faith and credit, but these statements cannot be verified since the opinions are not available. Bills have also been introduced in state legislatures, for example, in South Dakota, which would resolve the issue by adopting the rules of the Uniform Reciprocal Enforcement of Judgments Act as between the state and specific tribes.

# CHAPTER 5

# POLICY ALTERNATIVES

## Introduction

At the beginning of this project, an Indian person remarked to one of the project staff, "You must be very naive to think that in one year you will be able to come up with solutions for a problem that has been around for hundreds of years."

Tension has existed between states and tribal governments since the founding of the United States, and the legal and jurisdictional problems that arise in the field of child welfare services are but another expression of this tension. The big stakes in the jurisdictional struggles between tribes and states concern water and mineral rights rather than child welfare, and it would indeed be naive to expect this tension to be resolved quickly.

One of the most striking findings of this project, however, is the degree of agreement among all parties--states, counties, tribes, and BIA officials--that the child welfare service system should be restructured to permit tribes to deliver direct services to tribal members. Indian officials preferred that the federal government contract directly with tribes, bypassing the states. There was surprising support for this alternative among state and county officials as well; their preferences were evenly divided between direct federal-tribal contracting and state-tribal contracting.

Any system of federal-tribal contracting would involve major restructuring of SRS programs as well as amendments to the Social Security Act. Widespread state-tribal contracting would also be a major change in the service delivery system and might require changes in PL 280. Both modes of contracting would require major expansions in the social service divisions of tribal governments or intertribal organizations. In spite of the fundamental nature of these changes, an overwhelming majority of the field study respondents favored direct provision of child welfare services by tribal governments.

In the short run, it is clear that fundamental changes are now occurring in the field of Indian child welfare. Increased activity by tribes in child welfare matters is perhaps the most significant development, particularly in light of the broad support for an eventual takeover of all child welfare services by tribal governments.

The emphatic assertion by many tribes that they do not wish tribal children to be placed in non-Indian homes off the reservation is having some effect. Officials at the twenty-six county offices visited in the course of the field study indicated that they had ceased making off-reservation placements without the approval of tribal officials. On some reservations, county offices had, in fact, ceased to provide child welfare services at all, except in very limited situations. But in other counties and states, there were definite signs that state and county personnel were reexamining their child welfare services for Indian people and were beginning to work with tribal councils in designing better ways to deliver services and methods for coping with legal and jurisdictional problems.

Another important development is a recent SRS Program Instruction which affirms that states do have the responsibility to provide child welfare services on reservations and must actively seek ways to resolve legal and jurisdictional problems. This chapter considers the Program Instruction, short-run policy alternatives for coping with legal and jurisdictional problems, and the long-run preferences in favor of major restructuring of SRS child welfare services on reservations.

## SRS Program Instruction of 30 December 1974

During the years 1972 through 1974, the Region VIII Office of SRS and the state of North Dakota worked out substitute arrangements for licensing child care facilities on reservations. In brief, the procedure is that the BIA or the tribe inspects a facility and determines whether it complies with state and/or federal standards. Upon receipt of this information, the state "approves" the facility, thus qualifying it to receive federal day care or AFDC foster care payments. In March 1974, the acting SRS regional commissioner in Region VIII formally requested SRS approval of this arrangement.

A legal memorandum prepared in the office of the DHEW general counsel in August 1974 and an SRS Program Instruction in December 1974 gave this approval. These documents responded to some of the issues that had been raised in April 1974 in the hearings on Indian child welfare before Senator Abourezk's Senate Subcommittee on Indian Affairs (see chapter 3, p. 27).

The memorandum and Program Instruction represent the strongest and most comprehensive recent DHEW statements concerning the legal and jurisdictional problems encountered in the delivery of child welfare services and assistance to Indian reservations. Both documents take the position that states must provide services on reservations and, wherever there are impediments to the normal provision of services, such as the licensing problem, states must actively seek ways to circumvent those impediments.

The legal memorandum addresses the issues of licensing, standards for child care facilities, and general state responsibility in providing services to reservation Indians. It outlines a strong stand, using Arizona v. Hobby and Acosta v. San Diego County for support, stating that as a condition of receiving Title IV monies states must provide services to Indian persons and find a way to approve foster homes on reservations; otherwise they are in violation of the Fourteenth Amendment's equal protection clause.

The memorandum deals with the possibility of permission being denied to inspect an Indian foster care home on a reservation. It cites Wyman v. James, where the state of New York was upheld in refusing to grant assistance when a home visit was refused by an AFDC mother. The memorandum concludes:

> In other words, a state may, and must, extend its assistance to Indians living on a reservation in the state on the same conditions that it applies to all other recipients in the state: namely, that the recipient abide by the laws and regulations of the state governing assistance under its various programs. If an Indian living on a reservation should refuse to comply with any of those regulations or laws, the state could merely terminate assistance.[63]

The most interesting theoretical discussion in the memorandum addresses the failure to put Indian children into Indian foster or adoptive homes. After citing testimony before the Senate Subcommittee on Indian Affairs in April 1974, the memorandum focuses on licensing standards:

> The standards which have been set are based on material criteria (sufficient living space, proper sanitation facilities, etc.) and do not take into account whether the child is harmed or not for lack of them. Also not considered are such non-material criteria as the values

> of living in a cultural community with family and relatives. The standards, it is alleged, are not only of questioned fairness, but their results have led to the breakup of countless families, and according to several hearing witnesses, have caused the creation and continuation of psychological problems for both the Indian parents and their children.
>
> The issue has been raised, in regard to child welfare programs relating to Indian children living on reservations, whether a state may set a different standard for approving reservation Indian homes for foster care and adoption than it uses for other groups. In determining this, two questions must be answered: will a different standard be consistent with the Social Security Act and will it also be in harmony with the Equal Protection Clause of the 14th Amendment . . . ?[64]

The memorandum examines Section 402 of the Social Security Act which requires that AFDC must be provided on a statewide basis and regulations which require that a state plan be in operation on a statewide basis.

The memorandum interprets these regulations as follows:

> *This should not be construed to mean that standards for reservation Indians may not be different* from those for non-reservation recipients across the state. If a standard produces substantially different results in one political subdivision of the state as contrasted with another, the standard is not uniform in terms of the results produced. Because the statute is directed toward a specific goal, solidarity of the family unit, it is the achievement of this goal that must be uniform and not the technical structure of the program [emphasis added].[65]

The Program Instruction of 30 December 1974 implements the finding of the legal memorandum. The Instruction was issued jointly by the Assistance Payments Administration and the Community Services Administration of SRS. It represents a compilation of previous DHEW determinations concerning service to Indian reservations: State Letter 1080 on recognition of tribal court orders, the Region IX attorney's opinions on what constitutes a public agency, and the numerous admonitions from DHEW which appeared in 1971 and 1972 at the height of North Dakota's refusal to provide child welfare assistance and services to the Indian

reservations. It uses unusually forceful language, ordering the states--as a condition of receiving Title IV-A and IV-B funds--to overcome existing legal barriers, if necessary by reaching agreements with other agencies, including tribes.

The Instruction affirms that a state must make strong efforts to overcome obstacles to the delivery of AFDC assistance to Indians who as "citizens of the State in which they reside . . . are . . . entitled to all rights, privileges and immunities that are accorded other citizens." A state cannot be "relieved of responsibility to supply AFDC foster care by asserting statutory or administrative authority, or lack of such authority, which prevents an otherwise eligible child from meeting all the conditions under section 408." In short, "it must take whatever action is necessary to remove obstacles to a child's eligibility."[66] Specifically, "where an Indian Tribal Court has jurisdiction over civil actions on an Indian reservation, it must be recognized as competent to make such a judicial determination."[67]

> A state agency must accept responsibility for care and services for an otherwise eligible child from an Indian Tribal Court, or enter into an agreement with the public agency which has accepted responsibility for the child. Refusal by the state agency to do one or the other could arbitrarily exclude from AFDC foster care and services all otherwise eligible children who are within the jurisdiction of an Indian Tribal Court. Thus, if action by the state agency is necessary to make the child eligible, the agency must take that action. . . .
>
> The State must license or approve for AFDC foster care foster family homes and nonprofit, private, child care institutions on Indian reservations, which meet the state's licensing standards.
>
> Even where the state believes it is without the power to enter a reservation for inspection purposes, it is responsible for obtaining the requisite authority, or for arranging with someone who has the authority, for inspection and reports to be made in order to carry out its responsibilities.[68]

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The discussion of day care follows similar lines. "As with foster care, Section 402 requires that the State provide assistance in the form of day care statewide for all eligible children, including Indian children."[69] The instruction goes on to suggest a possible contractual solution to the licensing problem: "For instance, the state could contract with the Tribal Council, or some other agency or organization with the requisite authority to carry out these responsibilities on behalf of the state agency. Whatever method is used, the state must carry responsibility for meeting the pertinent requirements of the law and regulations."[70]

The Program Instruction also reviews state licensing standards as applicable to Indian people, finding them inappropriate.

> The goals of Title IV . . . are: to encourage the care of dependent children in their own homes or in the homes of relatives; to help maintain and strengthen family life; and to help parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.
>
> *The present system of foster care, adoption, and day care for Indian children living on reservations has been defeating these goals.* Present standards, as applied to Indians on reservations in foster care and day care areas, have resulted in an extremely high rate of removing Indian children from their homes and families, compared to the rate for non-Indian children. A major reason for these statistics has been that the *standards employed in determining the fitness of homes for children are not attuned to Indian society* [emphasis added].[71]

The Instruction requires that the equitableness of standards be determined on the basis of their effect upon recipients rather than their similar statutory language. The Program Instruction repeats the arguments set forth in the legal memorandum and concludes:

> If one standard produces substantially different results in one political subdivision of the state as contrasted with another, the standard is not uniform in terms of results produced. *If different standards would be more likely to accomplish the goals of the Act, they are permissible*

*in order to remove the hardship, and in extreme cases may be required* [emphasis added].[72]

One of the difficulties with a program instruction is that it does not carry the force of a statutory provision or regulation. A program instruction is not published in the Federal Register or codified in the Code of Federal Regulations. In the hierarchy of program material issuing from SRS, program instructions fall after program regulations and program regulations guides (explanatory and interpretive material relating to one or more regulations). Thus, a program instruction is not readily available to the public and does not carry as much weight as other types of regulations.

In addition, there are several limitations in this particular Program Instruction. It attempts to make mandatory upon the states the development of agreements, when necessary, to overcome obstacles in licensing foster care and day care facilities on Indian reservations. However, no statute or regulation provides for a mandatory procedural mechanism which would arbitrate differences if and when they arise. The absence of a procedural mechanism to facilitate an order greatly weakens the force of the order. For example, it would be possible to take legal action against a state for refusing to make an agreement concerning licensing only if the state agency denied an official request to discuss an agreement.

Second, the Program Instruction requires a state agency to accept responsibility for a child referred by a tribal court. The matter may not be that simple; state supreme court cases, such as Black Wolf (following Kennerly), have determined that state agencies may not have the jurisdiction to accept such referrals. Further, the fall-back alternative, requiring the making of agreements to get around the jurisdictional obstacle, suffers from the same lack of enforceability already discussed in reference to licensing agreements.

Other difficult legal problems are raised by the statement in the Program Instruction that separate standards for foster homes and day care facilities for Indians are permissible and may be required. The memorandum upon which the Program Instruction is based expresses great awareness of the equal protection issue which lies behind the implementation of different standards to achieve equitable goals, citing Dandridge v. Williams. The memorandum states:

> In the case at hand, the classification upon which the standard would be based is Indians on reservations. The basis for the difference is clear: Indian culture and life style on reservations differ from that off reservations and require different treatment in order to fulfill the purpose of AFDC, which is to encourage family solidarity rather than destroy it.[73]

A practical argument can be made that the need for different standards for equitable goals applies to many ethnic groups, such as Mexican migrants or black inner-city dwellers. How, then, can Indians justifiably be singled out as the one group for whom separate standards are appropriate? The legal memorandum falls back on the unique political status of Indians, asserting that "the reservation Indians occupy a unique position in the United States, being the only judicially recognized minority group with a semi-nationality all their own."[74]

## The Development of Tribal Child Welfare Programs

No federal directive concerning state policies and practices will by itself resolve the jurisdictional tensions surrounding Indian child welfare. Any resolution of the basic jurisdictional problems will require federal legislation. In the short run, progress will be feasible only if it involves tribal governments as well as states and the SRS. Federal pressure may be important in working out practical arrangements for coping with the fundamental unresolved issues, but tribes and states must be ready to join in the search for a modus vivendi.

For example, SRS can require that states recognize tribal court orders granting the state custody in foster care and adoption cases. However, as long as tribal judges are fearful of inappropriate placements with non-Indian families, the judges are not likely to grant custody to the state, and the pressure by SRS will come to nothing. Indeed, both state and tribal officials may prefer a system in which tribes, rather than states, hold custody of reservation children.

A discussion of measures for coping with the jurisdictional problems in the context of the current legal structure for child welfare services must deal with the development of working relationships or bargaining relationships between states and tribes. On this front,

the outlook is gloomy but is improving slowly. In many states, no bargaining is yet occurring. In a context of major tensions over water rights, mineral rights, and other legal and jurisdictional issues, it is not easy for state and tribal officials to find ways to open discussions about child welfare without compromising other vital jurisdictional claims. In order for bargaining relationships to develop, both parties must have a modicum of information and technical expertise in the subject under discussion. Also, each side must be certain that the other party acknowledges its basic values.

Many tribes and states are just beginning dialogues about child welfare services. Indian tribes have informal and traditional procedures for dealing with child welfare problems. The federal-state child welfare system, with its maze of regulations and its underlying assumption of nuclear family structure, is alien to many Indian communities. Only recently have many tribal officials been concerned with the impact of federal-state child welfare activities. In many cases, the first tribal action in this field was a resolution by the tribal council opposing the placement of tribal children by the state or county with non-Indian families off the reservation.

Three of the ten tribes included in this study, Gila River, Navajo, and Zuni, now employ social workers who are active in child welfare matters. Each of these tribes is using a different funding base and a different approach. At Gila River, the tribal Child Protection Agency includes one worker who is attached to the tribal court. Funding is through an Office of Native American Programs (ONAP) grant. At Zuni, the tribe has contracted with the BIA to provide the full range of BIA social services. The Navajo Tribal Office of Social Services has negotiated purchase-of-service contracts with the state departments of social services in Arizona and New Mexico. In both cases, the tribe is providing the local share to earn matching funds from SRS. The Navajos and the states of Arizona and New Mexico have gone through a lengthy and difficult process of preparing applications for SRS section 1115 Research and Demonstration Projects. Neither of the 1115 applications has been approved.

The efforts of these three tribes should be looked on not only as providing needed services but also as experiments of different ways for tribes to become involved in child welfare matters. Each approach has both advantages and difficulties, and different tribes may wish to adopt different approaches to suit local situations.

Another important part of recent tribal activity in the area of child welfare concerns tribal codes and tribal courts. Some tribal codes already include sections on child welfare matters, and other tribes are writing such sections. Several model child welfare codes have been developed by various agencies. Also, training programs for tribal judges and for BIA and county social workers are being developed. The BIA recently contracted with the National American Indian Court Judges Association and the American Humane Association for a series of workshops on child welfare matters. SRS has also begun activity in this field.

Tribal council resolutions and the growing misgivings about interracial placements of Indian children have had an impact on many states and counties. Most of the county social workers interviewed reported that they would not place a reservation child in a non-Indian off-reservation home. It is possible that such placements are being made at other reservations, through private agencies, or through the "back door," when children temporarily leave the reservation and thus move out of the jurisdiction of tribal courts. Some states are taking positive steps to assure that a child's links with his tribe are not broken. The state of Washington, as noted in chapter 3, is revising its social service manual to require that social workers make a genuine effort to find Indian foster or adoptive parents before resorting to placements with non-Indian families. Washington and Wisconsin have amended their manuals to require that Indian children be enrolled in their tribes before adoptive placement off the reservation.

There are also significant efforts to recruit Indian foster parents. For example, a county worker in the Rosebud Reservation recruited forty Indian foster parents who are now licensed by the state. Similar efforts have been successful at Yakima Reservation and elsewhere.

Several barriers remain, however, in recruiting Indian foster parents. Often training materials for foster parents are oriented toward middle-class white families. As the SRS Program Instruction notes, licensing standards are often unnecessarily stringent in terms of physical facilities and are otherwise unsuited to reservation conditions. A joint federal-state-tribal effort to write standards appropriate for the reservation context would permit additional progress. Such an effort should recognize the wide variations in cultural and social patterns, economic conditions, and other factors between different reservations and should permit some local variation in standards or procedures.

## Short-term Policy Alternatives

Several alternatives are available to SRS and to other federal agencies for dealing with the legal and jurisdictional problems that arise in the delivery of SRS child welfare services on reservations. The policy alternatives listed in this section represent a wide variety of possible strategies which could be implemented without major structural changes in SRS programs. Some alternatives lean in the direction of tribal self-determination and tribal control of child welfare services on reservations. Others lean more strongly in the direction of encouraging or mandating more active state involvement in reservation child welfare matters. A third group of alternatives would focus specifically on the substance of child welfare services provided on reservations.

The BIA and the IHS may play important roles in the expansion of tribally-run child welfare programs. Under the Indian Self-Determination Act of 1975, tribes may receive capacity-building grants from the BIA and the IHS and may request that the BIA and the IHS contract with them for the delivery of services. The regulations for this legislation are now being drafted. In light of the trend toward tribal operation of services through purchase-of-service contracts, the BIA may wish to reassess its contracts with state departments of social services for group care and foster care services.

Most of the BIA and the IHS contracts with tribes will probably be for services other than child welfare. Therefore, SRS should turn its attention to promoting the development of child welfare services. At present, the only direct channel for tribes to obtain SRS funds is through Section 1110 and 1115 Research and Demonstration grants. One problem with these grants is that they are limited to three years and thus are not a firm funding base for establishing a tribal child welfare program. Another difficulty is illustrated by the case of the Warm Springs Reservation. Warm Springs operates a child welfare R&D project which has been exceptionally successful in recruiting Indian foster parents, reducing off-reservation placements, and improving child welfare on the reservation. However, the purpose of a 1115 grant is usually not to provide services per se but to experiment with some innovative feature. The Warm Springs project has been criticized for focusing on delivering services, even though they are needed, rather than focusing on research per se.

One alternative open to SRS would, therefore, be to make a series of R&D grants whose explicit purpose would be to experiment with different ways that tribes might be involved in the delivery of the standard child welfare

services. SRS could consider working with other DHEW agencies in identifying resources for a series of experimental projects to establish or develop tribally-run child welfare programs. SRS could also support training programs for professional and paraprofessional Indian workers in child welfare, technical assistance projects aimed at improving tribal management systems for social services, and projects focused on tribal codes and tribal courts.

In order to strengthen the role of tribal courts in child welfare matters, SRS could propose legislation requiring states to grant full faith and credit to orders of tribal courts in all matters related to child welfare. In PL 280 states where tribes do not have jurisdiction over child welfare matters on reservations, the role of tribes in adjudicating child welfare cases could be increased only by amending PL 280 to permit tribes to resume jurisdiction. (See chapter 4, pp. 66-69.) In order to encourage tribal operation of programs on contract with states, SRS could amend Title IV and Title XX regulations to specifically designate tribal governments as public agencies with whom SRS or states could legitimately contract. (See chapter 2, pp. 19-23.)

If SRS chose to mandate more active state involvement in child welfare services on reservations, an important step would be to design procedures to enforce the Program Instruction of 30 December 1974 and to include the Instruction in the Code of Federal Regulations. (See pp. 74-78 above.) Another step in this direction would be for SRS to investigate the extent to which states are providing Title IV-B services for both AFDC and non-AFDC recipients on reservations as well as in other areas of the state and to enforce the statewideness requirement. (See chapter 3, pp. 35-36.)

SRS could also encourage states, through R&D grants, technical assistance, and training programs, to expand efforts to recruit Indian foster parents, to adopt arrangements similar to those used in North Dakota for licensing child care facilities on reservations, to revise boundaries of substate, multicounty districts, or to otherwise facilitate less complex relationships between tribes and substate districts, and to conduct training programs for non-Indian staff in Indian cultures, family structures, and child welfare matters. States could also be encouraged or assisted in providing subsidized adoptions of Indian children by Indian parents.

Several options are available which would focus specifically on the substance of child welfare services on reservations. SRS could organize task forces or demonstration grant projects to adopt licensing standards for foster case and day care to be more relevant to reservation conditions. (See chapter 3, pp. 36-37 and chapter 5, pp. 76-77.)

SRS could encourage or mandate states to revise social service manuals to include provisions similar to those adopted by the state of Washington, concerning (1) the placement of Indian children with Indian foster or adoptive families whenever possible; (2) notification of tribal courts or tribal governments of all protective service, foster care, or adoptive cases involving tribal children, unless families have severed ties with tribes; (3) enrollment of all Indian children in their tribes prior to foster care or adoptive placement.

SRS could reevaluate its policies concerning the undesirability of long-term foster care payments in situations when Indian children are placed in foster care with relatives or other tribal members. (See chapter 3, pp. 28-29.)

Finally, SRS could establish in the office of the administrator an Indian desk to coordinate action on the above policy alternatives and to work with BIA and other federal agencies, tribes, and states in improving the quality and availability of child welfare services for Indians.

## Major Structural Changes in SRS Child Welfare Services on Reservations

The field research uncovered a surprisingly broad sentiment in favor of major structural changes in SRS child welfare programs for reservations. There was widespread agreement that tribal governments should run child welfare programs on reservations. A majority of the three dozen state, county, tribal, and BIA officials interviewed stated that the best system would involve direct federal funding of programs operated by tribes. The second preferred alternative was state contracts with tribes for child welfare services on reservations.

Each respondent was asked a series of questions about his perception of the adequacy of current child welfare service systems for reservation children and what changes he would like to see in the system. Each respondent was also presented with a list of possible funding and administrative alternatives to the current system. These

alternatives included current structures, modifications of current structures (for example, increased federal funding for services to on-reservation Indian people), and new patterns, such as a variety of direct federal-tribal relationships (see table 3).

State Responses. When asked an open-ended question about what role they felt they should play in the provision of child welfare services on reservations, most state child welfare administrators indicated they preferred a consultative or technical assistance relationship to the tribal government, which would itself provide the direct services. Officials in the five states not under PL 280 said they would prefer to help tribes develop tribal service delivery systems and that states should have little or no responsibility for providing funding for these services. In the three states under PL 280, officials said they felt the state had a responsibility to provide funding for services on reservations, but that services should be provided through tribal governments as much as possible. Officials in two states also mentioned the need for licensed Indian child-placement agencies which could be supported with state and federal funds.

In response to the list of alternatives, three administrators preferred direct funding from SRS to tribes. These officials preferred this alternative because it would relieve states of the fiscal burden of supporting services on reservations and also because it would relieve them of the burden of being middlemen between tribes and the federal government. The three also remarked that the "extra" layer of state government caused obstacles to the delivery of services. All three administrators were from PL 280 states.

The five other administrators of state child welfare programs preferred a system which would include increased federal funding for services on reservations and would allow the states to contract with tribes for the delivery of services. Three of the five indicated they felt states should contract with tribes; the other two felt this should be an option that states could use if desired.

All eight officials agreed that the two least desirable alternatives would be either retaining the current system and funding formulas or expanding BIA programs to encompass all child welfare services on reservations.

County Responses. There was much diversity in the preferences of county welfare officials. In response to the open-ended question about the role that counties should play, the largest cluster of preferences was for a role of

TABLE 3
SERVICE DELIVERY ALTERNATIVES FOR
ON-RESERVATION INDIAN CHILDREN
AND FAMILIES

| | |
|---|---|
| Federal-State Systems | (1) Deliver services through regular federal-state system with current funding patterns<br><br>(2) Deliver services through regular federal-state system with increased funds through tribal participation in funding<br><br>(3) Deliver services through regular federal-state system with additional federal share in funding for on-reservation Indians |
| Federal-Tribal Systems | (4) Direct funding to individual tribes from SRS so that tribes might provide their own services or contract to have the services provided<br><br>(5) Direct funding to individual tribes from BIA so that tribes might provide their own services or contract to have the services provided<br><br>(6) Direct funding from SRS to statewide intertribal agencies to provide services to Indian residents of reservations<br><br>(7) Direct funding from BIA to statewide intertribal agencies to provide services to Indian residents of reservations |
| Federal Systems | (8) Federally operated in-house SRS programs for tribes (i.e., like Indian Health Service within the U.S. Public Health Service)<br><br>(9) Increased funding to the BIA and expanded BIA social service programs within the current BIA structure |
| Federal-State-Tribal Systems | (10) Current federal-state funding patterns but state contracts with tribe to provide services for on-reservation tribal members<br><br>(11) Increased federal share in funding to state and state contracts with tribe to provide services for tribal members on reservation<br><br>(12) Other (specify) |

consultation and technical assistance to tribes, which would themselves provide direct services. Five officials said they felt counties should provide direct services; two said that counties should have no role at all. One preferred that BIA take the lead role with county support, and four were uncertain.

In response to the list of alternatives, two-thirds of the county welfare respondents preferred a system in which tribes would provide direct services. Half of these preferred direct funding from SRS to tribes, bypassing states and counties. These respondents often said that tribes would be "better off to stay away from states," and that routing funds through the state would involve substantial and unnecessary administrative costs. The other half of the respondents who preferred tribally-run systems felt that tribes should receive funding through purchase-of-service contracts from the state. These respondents also stated that the federal formulas should call for more federal funding for services to reservations.

The remaining one-third of county officials held diverse preferences. Two preferred direct funding by SRS of intertribal agencies. Two felt that the BIA system should be expanded to take responsibility for all child welfare services on reservations, while three were uncertain. Only one preferred a system in which the state-county system provided child welfare services on reservations.

Responses about the least-desired alternative were also scattered. One-third felt that neither tribes nor the BIA could provide adequate services.

BIA Responses.. Of thirteen BIA agency social service supervisors, six felt that the BIA should bow out of direct services and help tribes develop their own service delivery capacities. Three preferred no change. One preferred an expanded BIA role, and one stated that counties should become "fully responsible." Two had no preferences.

In response to the list of alternatives, all but two BIA social service supervisors preferred systems in which tribes would provide services with direct federal funding. Those two preferred expanded BIA services and expressed the feeling that a contracting system with tribes could not insure the hiring of qualified staff.

Of the overwhelming majority of BIA respondents who preferred tribally-run systems, most preferred that BIA administer the contracts. Three were indifferent between the BIA and SRS. One-quarter of all respondents preferred that SRS fund the system. A typical comment from these respondents was that DHEW has the necessary resources--money, staff, and concern with social services--whereas BIA does not.

One-half of the BIA respondents felt that the current system was the worst alternative. One-quarter felt that funding of intertribal agencies would be disastrous because of intertribal conflicts. Two BIA workers felt that any expansion of the BIA system would be least desirable on the grounds that it is a paternalistic system.

Tribal Responses. Ten tribal judges and ten council persons responded to the questions. Only one judge and one tribal chairman felt that their tribes should not become more involved in delivering child welfare systems. The chairman said that the BIA has a special and continuous responsibility to provide these services to tribal children. For the tribe to try to provide its own services was, he felt, an invitation to termination. The tribal judge who opposed tribal involvement in child welfare services based his preference on the inadequate resources of the tribe. He preferred that the state social service system and state courts take over full responsibility for child welfare services for children of his tribe.

All of the remaining eighteen tribal officials stated that the tribes should develop their own services and capacities as much as possible. Of these, one-half preferred direct federal funding by the BIA to tribes and one-half preferred direct funding by SRS. In the view of the eighteen respondents, the worst alternative is the present system. The other two felt that any system which called for tribal delivery of services would be least desirable.

Methods of Structuring Tribal Administration of Child Welfare Services

The alternative system that received the most support from respondents was direct federal contracting to tribes for the delivery of child welfare services. This would involve far-reaching structural reforms. A change in the Social Security Act would be necessary to remove the burden of service delivery from the states.

It would be difficult to decide which titles of the act would be affected. Title IV-B programs are supported primarily by state funds. Tribes would benefit very little from a change restricted to Title IV-B, since a relatively small amount of additional federal funding would become available to them. The means-tested child welfare services, formerly in Title IV-A, are now combined with means-tested services to adults in Title XX. It might not be feasible to divide funds and responsibilities for Title XX programs on reservations between states (for adults) and tribes (for children). A similar problem arises for the Title IV-A AFDC foster care program, which is an important part of child welfare services but which includes both services and financial assistance.

If tribes were given responsibility for Title XX and/or Title IV-A programs as well as IV-B programs, this would cause major reductions in the budgets of many state welfare departments. In some states, Indians constitute as much as 30 percent of the AFDC caseloads. Even if relieved of responsibilities to reservation Indians, some state welfare departments might feel apprehensive about such a massive reduction in their budgets. On the other hand, such a reduction might improve states' financial positions.

Another factor that might make states hesitant to transfer their child welfare responsibilities to the tribes is the precedent which would be set by removing their control of federal-state welfare programs for reservations. Persons committed to tribal self-determination would find much to applaud in such a step, but states might be apprehensive that the next demand would be for other federal-state programs--vocational rehabilitation, various health programs, highways, and others--to be turned over to tribes.

Additionally, some tribes might be unwilling or unable to manage their own child welfare programs. Small tribes with only a few hundred members would probably not be able to support specialized child welfare services. They could either band together for a single federal contract, ask the state to provide services to the tribe under a subcontract, or remain within the current federal-state system. Legislation should include provisions for tribes and states to exercise options and, perhaps, to switch from one structure to another. Few Indian tribes could afford to pay the same local share as a state government. A 100 percent federal subsidy for tribal social service programs from SRS funds, a combination of SRS and BIA funds or some other package of federal funds, would probably be unavoidable.

A very difficult question for a system of tribally-run social services is how to define exactly who the tribe would have the responsibility to serve. Many reservations, particularly those in the plains states, have substantial non-Indian populations. Would tribal governments be responsible for serving non-Indians who live on the reservation? What about checkerboarded areas? Also, who would define who is an Indian for the purposes of these programs?

If tribes managed their own social service programs with direct federal support, changes would be necessary in federal administrative structures and procedures. One option would be for SRS to treat reservations as states. With slight changes in the boundaries of federal regions, each reservation could relate to a regional SRS office as states presently do. Of course, the federal role in overseeing the administration of services by a government serving 3,000 people (as many tribal governments do) would be very different from overseeing a state of a million persons. Therefore, it might be desirable for SRS to designate an eleventh region, which would oversee all federal-tribal contracts.

Another alternative would be to combine this SRS "eleventh region" with BIA social service programs. The integrated programs could be administered by BIA, by SRS, or by a new DHEW agency similar to the Indian Health Service. Such a new agency might be called the Indian Social Service. In planning such an agency, it would be wise to study the legislative changes required and the long-run impact of transferring health programs from the BIA agencies to DHEW, as was done in the 1950s.

An even more radical alternative mentioned by some persons would be to dispense entirely with federal administration and transfer congressional appropriations directly to tribal governments.

A system of state-tribal contracting for social services would also raise a variety of difficult questions including several mentioned above, such as the question of who would be covered by tribal social services. Even if states were only encouraged to contract with tribes, several legislative changes might be advisable. In order to build the capacity of tribal governments, it would probably be advisable to amend PL 280 to return jurisdiction over child welfare matters to all of the tribes which might contract with states. (Repeal of PL 280 is, of course, a major objective of many Indian groups.)

A second legislative change which might be helpful would be a modification of the "statewideness" provision of Title IV-B and the "single state agency" provisions of Titles IV-A, IV-B, and XX to permit states and tribes more flexibility in their contractual relationships. It might also be helpful in smoothing the way for state-tribal contracts for SRS regulations to be amended to state clearly that for the purposes of the Social Security Act, tribes are public agencies with whom states can contract.

If states were to be required to contract with tribes that chose this option, amendments to the Social Security Act would be required. Such legislation could be modeled on the Indian Self-Determination Act, which concerns only BIA and IHS programs.

It should be noted that neither a federal-tribal contracting system nor a state-tribal contracting system would resolve all jurisdictional questions between states and tribes over child welfare matters. Public institutions and community-based services for handicapped persons and for delinquent youth are supported primarily by state governments, and school systems are supported by state and local governments. Indian persons have a claim to the benefits of such state and local human service and education programs. Although they do not pay property taxes on reservation land or income taxes on income earned on the reservation, they do pay many other state and local taxes. If all SRS-supported child welfare services were contracted by a state to a tribe, questions would remain about the relationships between SRS programs and state-financed programs for children.

Although many of the questions raised in this section are difficult, answers can be found to most, if not all of them. In view of the strong consensus among the respondents in the field research in favor of direct tribal provision of child welfare services, SRS should give serious consideration to an effort to study these questions and to design a system to support tribally-run social service programs.

Summary

This report has identified a number of alternatives for dealing with the legal and jurisdictional difficulties that arise in delivering child welfare services on reservations and in improving the quality and appropriateness of these services.

In the long run, no final resolution of the basic jurisdictional tension will be possible without major federal legislation, probably including amendments to the Social Security Act. There is widespread support for direct federal funding of child welfare programs through tribal governments. Others prefer mandatory or voluntary state contracts with tribes. The first policy alternative open to SRS is, therefore, to define in more detail how SRS funds could be channeled to Indian tribes that wish to participate in such arrangements. These discussions should involve representatives of Indian tribes, national Indian associations, states, the BIA, elected officials, and other involved federal agencies.

While basic structural reforms are being designed, various short-term improvements are feasible. Some short-term alternatives would be essential forerunners of any basic reform. The most important is continued development of tribally-run child welfare programs. Several models of tribal involvement in child welfare could be developed and tested in different contexts. No single model is likely to satisfy all Indian tribes; their situations are far too diverse. The Navajo Nation of 130,000 or more members will undoubtedly not choose the same tribal child welfare system as the small Goshute Tribe.

These two primary policy alternatives, plus others that have been discussed in previous pages, are listed in the following pages.

*Primary SRS Policy Alternatives*

- Design legislation and implementation plans to permit tribal governments to take over delivery of Title IV-B and Title XX child welfare services and possibly other social service and financial assistance programs on reservations, considering both direct federal funding of tribally-run programs--the alternative with the most widespread support among respondents--and a system of state-tribal contracts.

- Assist tribes in expanding their activities in monitoring, adjudicating, and delivering child welfare services on reservations by:

    1. A series of SRS Section 1115 projects to test and evaluate different ways that tribes can be involved in the delivery of child welfare services

2. BIA-funded contracts to build tribal capacity
3. Technical assistance and projects focused on strengthening tribal management systems for social services
4. Projects focused on tribal codes and tribal courts
5. Training programs for professional and paraprofessional Indian workers in child welfare

*Other Alternatives Involving Federal Legislation*

- Amend PL 280 to permit tribes to resume jurisdiction in child welfare matters

- Propose legislation requiring states to grant full faith and credit to orders of tribal courts in child welfare matters

*Alternatives involving SRS Regulations or Policy*

- Amend Title IV and Title XX regulations to specify clearly that tribal governments are public agencies with whom SRS and states can contract

- Design procedures to enforce the SRS Program Instruction of 30 December 1974; include the Instruction in the Code of Federal Regulations

- Investigate the extent to which states are providing Title IV-B services for both non-AFDC and AFDC recipients on reservations as well as in other areas of the state

- Conduct research into legal and jurisdictional problems in the delivery of SRS assistance and services other than child welfare, especially in the Medicaid program

- Design standards for licensing child care facilities on reservations

- Reevaluate SRS policies concerning the undesirability of long-term foster care as it affects relatives or tribal members

- Establish an SRS Indian desk to coordinate action on policy alternatives listed here and to work with the BIA and other federal agencies, states, and tribes in improving the quality and availability of child welfare services for Indians

*Alternatives for SRS Involving State Law, Policy, or Practice*

- Encourage or mandate states to revise social service manuals to require the placement of Indian children with Indian foster or adoptive parents whenever possible, to require the notification of tribal courts or other tribal officials of child welfare cases involving tribal children, and to require [mandatory] enrollment of Indian children in their tribes prior to adoption

- Encourage states to expand efforts to recruit Indian foster parents and to develop appropriate training materials and programs

- Encourage additional states to adopt arrangements similar to those used in North Dakota for licensing on-reservation day care facilities, group care facilities, and foster homes

- Encourage states to revise the boundaries of substate, multicounty districts or to otherwise facilitate less complex relationships between tribes and substate districts

- Encourage states to conduct training sessions for non-Indian staff in Indian culture, family structures, and child welfare matters

*Other Alternatives*

- Reevaluate current BIA-state contracts for foster care

- Expand state and/or BIA funding of subsidized adoptions of Indian children by Indian parents

NOTES

1. 31 U.S. (6 Pet.) at 379 (1832).

2. 31 U.S. (6 Pet.) at 380.

3. 31 U.S. (6 Pet.) at 380.

4. 411 U.S. 164, 172, 173 (1973).

5. U.S., Congress, Senate, Senate Report No. 1080, Authorizing Indians to Form Business Councils, Corporations, and for Other Purposes, 73d Cong., 2d Sess., 1934, p. 1.

6. Letter from Franklin D. Roosevelt, included in U.S., Congress, House, Readjustment of Indian Affairs, 73d Cong., 2d Sess., 1934, H. Rept. 1804, p. 8.

7. H.R. 7902, 73d Cong., 2d Sess., 78 Cong. Record 2437 (1934).

8. Richard M. Nixon, "Recommendations for Indian Policy." Message sent to Congress 8 July 1970, reprinted in House Miscellaneous Documents, Vol. 2, 91st Cong., 2d Sess., 1970, Document No. 91-363, pp. 3-4.

9. Alan Parker, "State and Tribal Courts in Montana," Montana Law Review 33 (1972): 277, 286.

10. Parker, pp. 277, 285.

11. Parker, pp. 282, 285.

12. Parker, p. 277.

13. Joseph Mudd, "Indian Juveniles and Legislative Delinquency in Montana," Montana Law Review 33 (1972): 233, fn. 85.

14. 40 Fed. Reg. 16689, 16699 (1975).

15. Richard Schifter, "Trends in Federal Indian Administration," South Dakota Law Review 15 (1970): 6-7.

16. National Council on Indian Opportunity (NCIO), "Study of Federal Domestic Indian Assistance Programs" (Washington, D.C.: National Congress of American Indians, 1973), p. 4.

17. NCIO, "Study," p. 32.

18. NCIO, "Study," pp. 34-35.



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19. Regional Attorney IX Opinion, "Consideration of Navajo Tribal Funds as Public Funds," 12 November 1973, fn. 6.

20. The Federal-State Revenue Sharing Act, PL 92-512, Section 103(d)(1), cited in Regional Attorney IX Opinion.

21. Regional Attorney IX Opinion.

22. U.S., Congress, Senate, Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, Hearings, Indian Child Welfare Program, 93d Cong., 2d Sess., 9 April 1974, p. 449.

23. Social Service Board of North Dakota, Social Work Manual, Chapter 423, Section 4, "Foster Care Payment" (Bismarck, N.D.: Social Service Board of North Dakota, 1973).

24. Bureau of Indian Affairs Manual, Vol. VI, Community Services; Part VI, Welfare; Chapter 3, General Assistance and Social Services; Section 3.2, Social Services to Children; especially 3.2.6, Programs of Social Services and Assistance for Indian Children (Washington, D.C.: Bureau of Indian Affairs, n.d.), mimeographed.

25. At the time this study was being conducted, the BIA was in the process of making certain revisions in the social services section of the Manual. The manual that had been in use for a number of years had a section heading "Adoption of Indian Children" (3.2.6f) followed by the words "to be written." However, the revised manual includes material stating that the BIA is not an authorized adoption agency and cannot arrange adoptive placements, but that it can provide a social study on prospective adoptive parents or children at the court's request (section 3.2 and 3.3, esp. 3.2.6f).

26. Memorandum prepared by Felix S. Cohen, Assistant Soliciter of the Interior Department, 14 February 1935, quoted in Schifter, "Trends in Federal Administration," South Dakota Law Review 15 (1970): 2, fn. 4.

27. Arizona Department of Economic Security, "Navajo Social Services," Application for Demonstration Project Grant submitted to Department of Health, Education, and Welfare, Social and Rehabilitation Service, 1 August 1974 (Project Grant No. 11-P-45433/9-01), p. 9.

28. Arizona Attorney General to John Graham, Commissioner, Arizona Department of Public Welfare, 28 July 1970.

29. Arizona Attorney General to Graham, 28 July 1970.

30. Arizona Attorney General to Graham, 28 July 1970.

31. Arizona Attorney General to Graham, 28 July 1970.

32. 42 U.S.C. §602(a)(1).

33. 42 U.S.C. §622(a)(2).

34. 45 C.F.R. §220.40(a) (1974).

35. 397 U.S. 471, 485 (1969).

36. King v. Smith, 392 U.S. 309, 318-319 (1968).

37. 42 U.S.C. §2000(d).

38. 78 P.2d at 587 (Mont. 1938).

39. A.R.S. §46-232(A).

40. 272 P.2d at 98 (1954).

41. 415 U.S. 199 (1974).

42. 394 U.S. at 632, 633 (1969) (footnotes omitted).

43. 84 Cong. Record 9027 (1932).

44. 84 Cong. Record 9027-28.

45. 96 Cong. Record 2086 (1950).

46. The bills killed in committee are: S. 3548, S. 4137, and S. 4242 (1956); S. 54, S. 574, S. 1015, H.R. 3362, and H.R. 3634 (1957); H.R. 6379 (1963); H.R. 10230 (1964); H.R. 5366 (1965); S. 3527 and H.R. 15844 (1966); S. 2265 and H.R. 6776 (1969); H.R. 17060 and H.R. 17624 (1970).

47. 116 Cong. Record 43669 (1970).

48. 116 Cong. Record 33428.

49. 25 U.S.C. §13.

50. Bureau of Indian Affairs Manual, Section 3.2.6.

51. Department of the Interior, Bureau of Indian Affairs, "Operation of Indian Programs," in U.S., Congress, House, Committee on Appropriations, Subcommittee on the Department of the Interior and Related Agencies, Hearings, Department of the Interior and Related Agencies Appropriations for 1976, Part 3, 94th Cong., 1st Sess., 17 March 1975, p. 70.

52. U.S., Congress, House, Committee on Appropriations, Subcommittee on the Department of the Interior and Related Agencies, Hearings, Department of the Interior and Related Agencies Appropriations for 1964, 88th Cong., 1st Sess., 11 February 1963, p. 845.

53. U.S., Congress, House, Committee on Appropriations, Subcommittee on the Department of the Interior and Related Agencies, Hearings, Department of the Interior and Related Agencies Appropriations for 1970, Part 2, 91st Cong., 1st Sess., 6 March 1969, pp. 135-6.

54. U.S., Congress, House, Committee on Appropriations, Subcommittee on the Department of the Interior and Related Agencies, Hearings, Department of the Interior and Related Agencies Appropriations for 1974, Part 4, 93d Cong., 1st Sess., 9 April 1973, p. 634.

55. 358 U.S. 217 (1959).

56. 42 U.S.C. §608.

57. 42 U.S.C. §2003(d)(1)(F).

58. Buster v. Wright, 135 F. 947, (8th Cir. 1905), appeal dismissed 203 U.S. 599 (1906); Zevely v. Weimer, 5 Indian Terr. 646, 82 S.W. 941 (1904).

59. Department of Health, Education, and Welfare, Social and Rehabilitation Service, "Program Instruction APA-PI-75-13, CSA-PI-75-2," 30 December 1974 (mimeographed). Hereafter cited as Program Instruction.

60. 59 U.S. (18 How.) 100 (1855).

61. 63 F. 305 (8th Cir. 1894).

62. 70 Ariz. 380, 222 P.2d 628 (1950).

63. "State Obligations under the Social Security Act in Regard to Indians Living on Reservations," Department of Health, Education, and Welfare memorandum from Robert A. Dublin, Special Assistant to the Assistant General Counsel, to George Merril, Office of the Deputy Assistant Secretary for Legislation (Welfare), 9 August 1974, p. 4. Hereafter cited as Legal Memorandum.

64. Legal Memorandum, pp. 5-6.

65. Legal Memorandum, p. 6.

66. Program Instruction, p. 2.

67. Program Instruction, p. 2.

68. Program Instruction, pp. 2-3.

69. Program Instruction, p. 3.

70. Program Instruction, p. 4.

71. Program Instruction, p. 4.

72. Program Instruction, p. 5.

73. Legal Memorandum, p. 7.

74. Legal Memorandum, p. 7.

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